92-180

No. 92-

Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BTM CORPORATION, a Michigan Corporation,
Petitioner,

v.

ROBERT LILLEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID R. HEYBOER
(Counsel of Record)
LUCE, HENDERSON, HEYBOER, LANE,
BURLEIGH, CURRIER & MARTINEK
933 Pine Grove Avenue
P.O. Box 610944
Port Huron, MI 48061-0944
(313) 985-3333

Attorney for Petitioner BTM Corporation

July 28, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

A. Whether the standard to be applied in determining if an outside commissioned salesperson is an "employee" or an "independent contractor" under the Age Discrimination in Employment Act ("ADEA") 29 U.S.C. §621 *et seq.*, (and as applied in the Michigan Elliott-Larsen Act, M.C.L. 37.2201(a)) is the common law agency test, set forth by this Court in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. ___ (1992) and *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), or the "economic realities test" as developed from this Court's decisions in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) and *United States v. Silk*, 331 U.S. 704 (1947).

B. Whether the trial court's automatic finding of "willfulness" pursuant to 29 U.S.C. §626 and subsequent award of liquidated damages following a jury finding of retaliation violated Petitioner's right to a jury trial.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.2, the parties are set forth in the caption of the case.[1]

[1] BTM Corporation is a private, closely held corporation organized under the laws of the State of Michigan without any parent companies or subsidiaries of any nature.

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BTM CORPORATION, a Michigan Corporation,
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ROBERT LILLEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, BTM Corporation ("Petitioner"), respectfully prays that a *Writ of Certiorari* issue to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit which was entered in this civil action on March 12, 1992.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit (1a)[2] affirming the Judgment of the United States District Court for the Eastern District of Michigan is recorded at 958 F.2d 746 (6th Cir. 1992). The Order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with

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[2] Citation herein to material printed in the Appendices appears as "00a."

Suggestion for Rehearing En Banc (20a) is reported at 1992 U.S. App. Lexis 9047, No. 91-1063; 91-1100; 91-1398 (6th Cir. 1992). Also relevant to this Petition is the unreported April 11, 1989, Opinion Granting New Trial (36a), United States District Court (Honorable Avern Cohn); the unreported March 23, 1989, Memorandum Opinion Granting [Petitioner's] Motion for Summary Judgment, (24a), United States District Court (Honorable James Harvey); and the unreported February 28, 1991,[3] Memorandum [Opinion] on Motion for Pre-Judgment Interest and/or Liquidated Damages, (89a), United States District Court (Honorable Avern Cohn).

JURISDICTION

The Opinion of the Court of Appeals for the Sixth Circuit was entered on March 12, 1992 (1a). Timely Petitions for Rehearing with Suggestion for Rehearing En Banc which were filed by Petitioner and Respondent were denied by the Court of Appeals for the Sixth Circuit on April 29, 1992. (20a) This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §621, *et seq.*, the Age Discrimination in Employment Act ("ADEA") provides in pertinent part:

> "§630. Definitions""For the purpose of this chapter - f) the term 'employee' means an individual employed by any employer[.]"
>
> "§626.
>
> "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (ex-

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[3] The Memorandum, issued February 28, 1991, was the result of a bench decision December 20, 1991.

> cept for subsection (a) thereof), and 217 of this title, and subsection (c) of this section .... Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter."

M.C.L. [Michigan Compiled Laws] 37.2201 *et seq.*, provides in pertinent part, as follows:

> "Sec. 201. As used in this article:
>
> (a) 'Employer' means a person who has 1 or more employees, and includes an agent of that person."

STATEMENT OF THE CASE

A. Introduction.

The issues presented to this Court concern the applicable standard in determining whether an outside commissioned salesperson is an "employee" pursuant to the provisions of the Age Discrimination in Employment Act, ("ADEA"), 29 U.S.C. §621 *et seq.*[4] This Petition further presents to the Court whether a jury determination of a retaliatory act pursuant to ADEA automatically constitutes a "willfulness" finding pursuant to 29 U.S.C. §626, which mandates the imposition of liquidated damages.

The heart of this case is identical to *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. ___, 117 L. Ed.

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[4] While this action also contained a claim under the Michigan Elliott-Larsen Act, M.C.L. 37.2201 *et seq.*, Michigan determines the employee issue under "Elliott-Larsen" in reliance upon federal law. See *McCarthy v. State Farm Insurance*, 170 Mich App 454 (1988); *Langlois v. McDonald's Restaurants of Michigan, Inc.*, 149 Mich App 309 (1986); *Falls v. The Sporting News*, 834 F.2d 611 (1987).

2d 581, 112 S. Ct. 1344 (1992)—decided after the Sixth Circuit announced its opinion. Both *Nationwide* and the instant case are based on identical federal definitional statutes on including/excluding outside commission salespersons as "employees."[5] *Nationwide* settled the ERISA "employee" issue; Petitioner now presents the identical case for ADEA, on an outside commission salesperson's statutory inclusion or exclusion. The conflicting Court of Appeals ADEA decisions leave small business employers—after the fact—only to be carved up on the litigation luncheon table. That is wrong, and imperils both the American concept of honoring an arms-length business agreement, and small business employers who engage, by agreement, independent commission-only sales agents.

B. Proceedings below.

Respondent commenced the foregoing action under "ADEA" and Elliott-Larsen in the United States District Court for the Eastern District of Michigan on December 27, 1987. (59a) Federal Jurisdiction was invoked pursuant to 28 U.S.C. §1331. Respondent sought recovery for age discrimination and retaliation pursuant to ADEA and the Michigan Elliott-Larsen Act, M.C.L. 37.2201(a), as well as various other state claims. Following three separate trials, Respondent obtained a verdict on a claim of retaliation and was awarded liquidated damages pursuant to ADEA; Respondent further recovered mental anguish damages pursuant to the Michigan Elliott-Larsen Act.[6]

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[5] Both ERISA, 29 U.S.C. §1002, and ADEA, 29 U.S.C. §630, define "employee" as: "Any individual employed by an employer."

[6] The first trial resulted in a determination that Respondent was an "employee" of Petitioner under ADEA. This verdict was set aside following a Motion for New Trial. See Opinion (36a) wherein the court set aside the verdict due to prejudicial evidence, except the "employee" finding, which was allowed to stand despite the prejudicial conduct of Respondent's counsel.

Following pre-trial discovery, Petitioner filed a Motion for Summary Judgment pursuant to F.R.C.P. 56. In a Memorandum Opinion and Order dated March 23, 1989, the Honorable James Harvey, United States District Judge, granted Petitioner's Motion finding, pursuant to the "economic realities test,"[7] that Respondent was not an "employee." (24a) Respondent filed a Motion for Rehearing which was granted, and the trial court, without explanation, issued an order setting aside the grant of summary judgment. (32a) The matter proceeded to trial, which commenced on November 1, 1989.[8]

Respondent received a verdict in the first trial (November 1989) when the jury found that he was an "employee," and further found "age discrimination" and "willfulness." The trial court set the verdict aside (36a) due to prejudicial testimony, but did not set aside the determination that Respondent was an "employee." (51a-52a)

In the second trial (July 1990), the jury returned a verdict in favor of Petitioner, finding no "age discrimination," and in favor of Respondent, finding "retaliation." The trial court refused to instruct the jury on "willfulness," finding that, if a retaliation verdict was returned, willfulness was automatic. (86a-88a, 90a) The court, following a Motion for New Trial, granted a third trial as to damages only.

On appeal, the United States Court of Appeals for the Sixth Circuit (1a) found Respondent to be an "employee" of Petitioner pursuant to the "economic realities test." (4a-5a) The court further found the automatic award of liquidated damages to be justified given the particular facts of this case. (12a-13a)

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[7] *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983)

[8] On October 26, 1989, the Honorable James Harvey reassigned this case to the Honorable Avern Cohn, and five days later, trial commenced.

Petitioner filed with the Court of Appeals a Petition for Rehearing with Suggestion for Rehearing En Banc raising, among other issues, this Court's March 24, 1992 decision in *Nationwide*, *supra*, requiring the application of the common law test to an "employee" determination. That petition was denied, without explanation, on April 29, 1992.

C. Facts.

The trial facts [first trial] relevant to this Petition establish that Respondent became associated with BTM in October 1982. Respondent came to Petitioner seeking employment and had originally requested to be employed and receive a salary of $30,000.00; this request was rejected by Petitioner, as Petitioner did not want to employ a travelling salesman and could not afford a salesman. RL 11/1/89 T.26. ES 11/8/89 T.163.[9] Following further discussions, Respondent agreed to be an independent travelling sales representative on Petitioner's behalf, to be paid on straight commission basis of five percent of his sales. RL 11/1/89 T.26. Respondent was to receive no draws or advances against commissions, no medical plan, no vacation allotment, no participation in the profit-sharing or pension plans or any other of the benefits provided to all of Petitioner's employees. RL 11/3/89 T.218, 220. The machine-design engineering work required for customer price quotations by Respondent was provided by Petitioner's employees. RL 11/2/89 T.29-50. All of Respondent's customer price quotations were approved by Edwin Sawdon, President of BTM. RL 11/2/89 T.37, 50. After being retained to solicit orders for Petitioner in October 1982, Respondent went approximately eleven months without any commission checks. RL 11/3/89 T.186. During that time, Respondent collected state unemployment compensation from his pre-

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[9] The foregoing notations refer to transcript citations as filed with the United States Court of Appeals for the Sixth Circuit. These citations are noted to provide support for the factual allegations. (RL refers to Respondent Mr. Lilley; ES refers to Petitioner, BTM Corporation.)

vious lay-off at St. Clair Metal Products. RL 11/3/89 T.186. Respondent had no Social Security or income tax withheld from his sales commissions by Petitioner, received an annual independent contractor IRS Form 1099 and paid his own self-employment tax. RL 11/6/89 T.116, 215. Respondent controlled his own hours, and he selected and called on potential customers when and how he saw fit. RL 11/3/89 T.220. Respondent scheduled his own vacation time, did not have regular hours for visiting prospective customers, and received no employee benefits from Petitioner. RL 11/3/89 T.218. Respondent used office space when a desk and where available at Petitioner's manufacturing plant, desk, and had order typing assistance, telephone, "BTM business cards," a key to the plant door, and a telephone credit card. RL 11/1/89 T.26, 32-42. Initially upon his association with Petitioner, and because he lacked a car,Petitioner partially assisted Respondent with gas expense and meal reimbursement. RL 11/1/89 T.28; ES 11/7/89 T.17-18.

The issue of Respondent's "employee" status was presented to the jury in the first trial. Over objection of Petitioner's counsel, (70a-73a) the jury was instructed on the "economic realities test"[10] as to the employee determination and particularly, as follows:

> "More specifically, Robert Lilley says that he was an employee of BTM Corporation, which BTM Corporation denies. The term "employment" in social welfare legislation, such as the Federal Age Discrimination Act and Michigan's Age Discrimination Act, which is sometimes called the Elliott Larsen Civil Rights Act, *is given a broad interpretation so as to effectuate the liberal purposes of these laws.*
>
> "It is for you to decide whether Robert Lilley was an employee of BTM.

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[10] *Armbruster v. Quinn, supra.*

"Now the manner in which the parties viewed their relationship is not determinative of the issue. Rather, you must examine the economic realities underlying the relationship between Robert Lilley and BTM in an effort to determine whether Robert Lilley is likely to have been susceptible to the discriminatory practices which these laws are designed to eliminate.

"You should consider the degree of Robert Lilley's economic dependence on BTM. The determination of employee status rests upon the totality of the circumstances underlying the relationship between Robert Lilley and BTM.

* * *

"If there is a doubt or ambiguity in the matter, you should resolve it in favor of coverage. Establishment of an independent contractor relationship requires a convincing accumulation of factors indicating that Robert Lilley's services were rendered in pursuit of his separate business enterprise of selling those services.

(Emphasis added.) (82a-83a)

Following trial, a jury verdict was returned finding Respondent to be an "employee" of Petitioner, and various damages were awarded. This verdict was set aside due to prejudicial evidence, but the "employee" finding was allowed to stand. (36a)

The relevant facts on "willfulness," as established in the second trial [which resulted in a verdict in favor of Petitioner on age discrimination and a verdict for Respondent on retaliation], established that, in the fall of 1986, Respondent announced that he would stop providing his sales services to Petitioner as of October 1987. RL 7/18/90 T. 60 Respondent was to then embark on a world cruise on his sailboat. RL 7/18/90 T. 60 Between the 1986

announcement date and October 1987 [and prior to that], Respondent had various and increasingly frequent arguments with Mr. Sawdon concerning commission earnings.[11] ES 7/23/90 T. 146 In May 1987, Respondent requested Petitioner to waive the agreed October 1987 departure date; Petitioner refused due to the attitude and difficulties with Respondent. ES 7/23/90 T.99, 146. Between May 1987 and July 10, 1987, Petitioner contacted a local office of the Michigan Employment Security Commission to inquire whether Petitioner would have any legal problem if the services of an independent outside salesman were terminated. ES 7/23/90 T.151-153. Petitioner was advised he would not. ES 7/23/90 T. 156.

On Friday, July 10, 1987, Respondent and his wife met Petitioner late in the day. RL 7/16/90 T. 74 Respondent asked Petitioner to reconsider Respondent's October 1987 departure date; Petitioner would not. RL 7/18/90 T. 12 Following an occurrence upon which the evidence conflicted, Respondent's sales services to Petitioner ended on Monday, July 13, 1987,[12] ES 7/23/90 T. 110-113.

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[11] One of Respondent's contentions was the diversion of commissions. Respondent became upset over not being able to obtain a purchase order on a contract from CPC Parma (General Motors). Petitioner acknowledged at trial that he felt Respondent was "losing it" [the contract] and that Respondent was "confused" [as to how to change the machine design to obtain the contract], all of which upset Respondent. Petitioner provided BTM engineers to assist Respondent in obtaining the purchase order, but this order never materialized. ES 7/23/90, T.73, 158.

[12] Respondent claimed that after Petitioner would not reconsider the October departure date, he told Petitioner that a complaint had been filed with the E.E.O.C. for age discrimination, and on Monday, July 13, 1987, Petitioner ended Respondent's sales services. Petitioner claimed that after it refused to reconsider the October date, Respondent's wife started screaming at Petitioner, and, after due consideration Respondent's sales services were ended on Monday, July 13, 1987. The jury returned a retaliation verdict for Respondent. ES 7/23/90 T.102-108, 110.

Petitioner acknowledged that he knew it was against the law to discriminate against employees on the basis of age and the jury found that there was no age discrimination, at the same time, Petitioner did not consider Respondent to be an employee. ES 7/23/90 T.108-109.[13]

Regarding Petitioner's state of mind and his belief that Respondent was not an "employee," the court gave the jury a mid-trial cautionary instruction, in part as follows:

> "One of the issues . . . is whether or not that discrimination was willful, and I'll define for you at a later date what willful discrimination is."
>
> Ct 7/23/90 T.155-156.

Following the close of proofs, the court determined that it would not instruct the jury on willfulness, as a retaliation verdict would automatically mandate willfulness. (85-88a) Following the retaliation verdict, the court awarded liquidated damages pursuant to 29 U.S.C. §626. (89a)

REASONS FOR GRANTING THE WRIT

The Petition for Writ of Certiorari centers on two important issues of federal age discrimination law, raised by the decision of the Court of Appeals below, which have not been, but should be settled by this Court.

The first issue concerns the standard to be applied in determining whether an outside commissioned salesperson is an "employee" or "independent contractor" under 29 U.S.C. §630 of the ADEA (and correspondingly, the Mich-

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[13] Over objection of Respondent's counsel, the trial court allowed Petitioner to testify as to his belief that Respondent was not an employee [despite the verdict in the first trial], and in fact instructed the jury during trial that while Respondent was an "employee," Petitioner was allowed to testify as to his belief that he was not an employee to explain his actions. Ct 7/23/90 T.130, 135, 155.

igan Elliott-Larsen Act, M.C.L. 37.2201).[14] The Sixth Circuit applied the "economic realities test" to the decision below. (4a) That test completely contradicts the recent decision of this Court in *Nationwide, supra*, regarding the application of the common law agency test to an "employee" determination under Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. §1002. Whether the broad "economic realities test" is valid is a matter of paramount importance to all businesses and should be settled by this Court. Employers must be able to determine, with reasonable and clear standards, who is an employee,

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[14] While Respondent sought recovery under both ADEA and the Michigan Elliott-Larsen Act, M.C.L. 37.2201, it is clear the "employee" issue and in fact, all trial issues except mental anguish were determined under federal law. (See Appendix K, 74a, 82a; Appendix H, 36a, 51a-52a; Appendix A, 3a-5a, footnote 2.) While part of Respondent's recovery was the result of his state-law claim (the mental anguish recovery and interest on award of back pay, see 13a-16a), the "employee" finding was grounded on federal law. Thus, as the "employee" verdict did not result from a "plain statement" of reliance on adequate and independent state grounds, this Court may clearly review the issues. *Michigan v. Long*, 463 U.S. 1032 (1983); *Harris v. Reed*, 489 U.S. 255 (1989) and *Quinn v. Millsap*, 491 U.S. 95 (1989). As the "willfulness" verdict is founded on federal law only, the "employee" issue is squarely before the Court. Additionally, the "economic realities test" in Michigan, while perhaps valid in worker's compensation matters, *Wells v Firestone Co.*, 421 U.S. 641 (1984); *Farrell v. Dearborn Mfg. Co.*, 416 Mich 267 (1982); *Askew v. Macomber*, 398 Mich 212 (1976), has only been applied once in an Elliott-Larsen action, *McDonald v. State Farm, supra*, and the reliance and continued application of that test in Michigan is in doubt due to *Nationwide*, [and the State Court reliance on Federal Law] and the fact that the test itself [under Michigan Workers' Compensation law] developed from this Court's decision in *United States v Silk, supra*. (*McKissic v. Bodine*, 42 Mich App 203, 205 (1972), recognized by the Michigan Supreme Court in *Askew* as an excellent historical summary of the test. 398 Mich at 217, footnote 7.) Considering this background, a separate Michigan test is likewise in grave doubt. Additionally, under the Michigan Statutory Construction Test, the meaning of language is that which "would [be] naturally convey[ed] to the popular mind. *Committee for Constitutional Reform v. Secretary of State*, 425 Mich 336 (1988).

and who is an independent contractor for purposes of ADEA coverage.

The second issue concerns whether a jury verdict of retaliation *automatically* mandates a finding of "willfulness," and therefore an award of liquidated damages pursuant to 29 U.S.C. §626. An automatic finding of "willfulness," regardless of any defense by the employer, deprives an employer of a jury determination on "willfulness" liability. While this Court has determined that the right to a jury trial exists under ADEA, *Lorillard v. Pons*, 434 U.S. 575 (1978) and that the Congressional intent for a willfulness determination mandates a two-tiered finding before liquidated damages may be awarded, *Transworld Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), the ruling by the Sixth Circuit in affirming the trial court's automatic award of liquidated damages (12a-13a) is contrary to the requirement that there be a two-tiered finding of liability and thereby threatens all employers with double damages in each and every case where an underlying ADEA claim is established.

I.

THE COURT OF APPEALS' CONSTRUCTION OF THE "EMPLOYEE" AND LIQUIDATED DAMAGES PROVISIONS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) RAISE IMPORTANT QUESTIONS OF FEDERAL LAW THAT ARE OF NATIONAL SIGNIFICANCE AND SHOULD BE DECIDED BY THIS COURT.

A. AN "EMPLOYEE" UNDER ADEA MEANS AN EMPLOYEE AS DEFINED BY COMMON LAW.

The dispositive issue in this case is whether Respondent is an "employee" of Petitioner. 29 U.S.C. §630 provides, "employee means an individual employed by an employer." Independent contractors are not afforded coverage under

ADEA. *Falls v. The Sporting News*, 834 F.2d 611 (6th Cir. 1987).

This Court has recently addressed the identical issue regarding an "employee" under ERISA, 29 U.S.C. §1002, and applied the common law agency test. *Nationwide, supra.* In the case at bar, the Sixth Circuit applied the "economic realities test." Both the definition of "employee" and the rationale under ADEA are identical to the definition and rationale under ERISA; as such, the common law agency test should apply. *Nationwide.*

In construing and interpreting legislation, "the language employed by Congress and the assumption that the ordinary meaning of that language accurately expressed the legislative purpose" is the controlling test. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). This Court in *Nationwide, supra,* most recently applied the foregoing principle and, citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), stated:

> "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. . . . In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. See e.g., *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323 (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228 (1959) (*per curiam*); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915).' 490 U.S., at 739-740"
>
> 503 U.S. at ___, 117 L. Ed. 2d at 589.
>
> The common law agency test as applicable, in *Reid*, provides:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the firing party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." 490 U.S. at 751-752 (footnotes omitted).

In *Nationwide* (ERISA) and *Reid* (Copyright Act, 17 U.S.C. §101), this Court applied the common law agency test to an "employee" determination, and found nothing in the text of these statutes to indicate a contrary legislative intent or meaning. The "employee" definitions in ADEA and ERISA are identical. 29 U.S.C. §630; 29 U.S.C. §1002(6). The ADEA definition of "employee," 29 U.S.C. §630, provides absolutely no guidance or suggestion for a test other than that of the common law; therefore, the *Reid* presumption must apply, and the established common law test is mandated.

1. CONGRESSIONAL INTENT.

A complete review of the ADEA statute and the legislative history clearly supports the application of the common law agency test. The legislative history is void of any discussion of the meaning to be applied to "employee." H. Rep. No. 805, 90th Cong., 1st Sess. 202 (1967), re-

printed in 1967 U.S. C.C.A.N. 2213 (1967). While the record discusses, in summary fashion, the definition of "employer" (Id. at pgs. 2223-2224), no statement of any Congressional intent or reference to prior legislation or court decisions as to the definition of "employee" exists. Although Congress discussed the plight of a specific group of employees (stewardesses in the airline industry) and in that context noted, citing the Fair Labor Standard Act, (FLSA) 29 U.S.C. §201, that special cases require special treatment (Id. at pgs. 2226-2227), [none was provided for the stewardesses], nowhere did Congress express any intent to apply a test for "employee" determination other than the common law test.

Not only is the legislative history silent on a meaning, but the Act itself provides nothing to indicate Congressional intent.

The lack of definition of who is an "employee" and Congress's use of this term throughout the legislative history lead to the sole conclusion that Congress was focusing on the traditional employer/employee relationship. Providing coverage for workers having that traditional relationship will clearly not interfere with the goals of ADEA.

In fact, not only is the above legislative history devoid of any indication of any Congressional intent to the contrary, but the underlying "judicial rationale" [*Armbruster*][15] upon which the lower court relied is seriously flawed

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[15] *Armbruster*, in which the Sixth Circuit applied the "economic realities test," stated:

"Since this statute has been universally held to be broadly remedial in its purpose, such remedial effect can be given only upon a broad interpretation of the term employee. We are unpersuaded that the term 'employee' was meant in a technical sense, divorced from the broadly humanitarian goals of the Act."Second, with due respect, we cannot agree that Congress meant to inject a limited meaning into the statute by use of the term 'employee,' 'employed,' or 'employer.' We find no tacit dichotomy between employees and 'independent contractors' en-

in light of the decisions in *Reid* and *Nationwide*, which clearly reject the *Armbruster* rationale. Based upon this Court's most recent and abundantly clear ruling in *Nationwide*, the "economic realities test" is the wrong test to apply in an ADEA action.

2. RATIONALE OF THE CIRCUIT COURTS IS NO LONGER VALID.

The Circuit Courts of Appeal which have addressed the "employee" issue have applied three different tests.[16] The frequent application of the economic realities test/hybrid test results from a judicial construction of ADEA requiring the term "employee" to be broadly construed "in the light

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shrined in Title VII. As note, the framers of Title VII specifically used the NLRA as their model. In reaction to prior Supreme Court decisions which had mandated the use of an economic realities test for determining whether an independent contractor was an employee for NLRA purposes, see e.g., *NLRB v. Hearst Publications*, 322 U.S. at 129, 64 S.Ct. at 859. Congress amended the Act to exclude all independent contractors by its terms. This amendment was on the books *before* Title VII was formulated and yet Congress incorporated no similar provision into Title VII. In that Congress was specifically aware of the judicial construction accorded the term 'employee' absent an *explicit* limitation, we now refuse to *imply* such a restriction into the otherwise broad terms of Title VII. We cannot do so especially in view of the broad terms, reasonably precise exceptions and legislative history all directed toward a test of coverage to all those who are in a position to suffer the harm the statute is designed to prevent, unless specifically excluded. Were there a doubt or ambiguity in the matter, we would resolve it in favor of coverage. See *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1979)."

[16] Tests are the common law "right to control test", *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir. 1982); the "hybrid test,"*E.E.O.C. v. Zippo Mfg. Co.*, 713 F.2d 32 (3rd Cir. 1983); *Oestman v. National Farmers Union Ins. Co.*, 958 F.2d 303 (10th Cir. 1992); *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979 (4th Cir. 1983) and the "economic realities test," *Hickey v. Arkla Industries, Inc.*, 699 F.2d 748 (5th Cir. 1983), *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983). While the foregoing cases involve an application of "employee" to both ADEA cases and Title VII actions, the test originated from *NLRB v. Hearst, supra.*

of the mischief to be corrected and the end to be attained." *NLRB v. Hearst*, *supra*. Given the total rejection of the "mischief to be corrected" rationale in *Nationwide*, 503 U.S. ___; 117 L. Ed. 2nd at 490-591 and the application of "settled meaning" under common law, the lower court rulings must be rejected in light of this Court's refusal to follow that course. See *Nationwide*, *Reid*. In fact, as the rationale applied in *Armbruster* was rejected by this Court this spring, it has no continued validity.

3. THE COMMON LAW DEFINITION OF "EMPLOYEE" IS CONSISTENT WITH THE PURPOSE OF ADEA.

In *Nationwide supra.*, this Court held that the term "employee" as set forth in the ERISA, 29 U.S.C. §1002(6), is to be determined pursuant to common law agency principles. In so ruling, this Court noted the "nominal definition" of "employee"[17] to be circular, explanatory of nothing, and thus applied its holding in *Reid*, *supra.*, regarding the "employee" interpretation test.

In concluding that common law agency principles governed the "employee" ERISA determination, this Court, in *Nationwide*, distinguished its prior holdings in *Hearst Publications*, *United States v. Silk*, 331 U.S. 704 (1947) and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), and expressly rejected the construction of ERISA "employee" under the broad interpretation tests of this trilogy and limited any further reliance upon these decisions.[18]

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[17] "Any individual employed by an employer," 29 U.S.C. §1002(6).

[18] In both *Silk* and *Hearst*, the Court's opinions were founded upon a judicial interpretation that an expansive, broad definition in light of the perceived purposes of the legislation was appropriate. In *Hearst*, this Court reversed an NLRB ruling finding that common law should not restrict the scope of the term "employee," but rather the term should be "understood with reference to the purpose of the Act and

Despite the plain, unambiguous definition of "employee," appellate courts have followed the *Hearst* and *Silk* rationale of construing the term "in the light of the mischief to be corrected and the end to be attained." See *Armbruster*.

Each time this Court has interpreted a statute containing a definition of "employee" broader than common law, with the rationale being the general purpose of the statute, Congress has amended the legislation to reaffirm an intended common law test. See *NLRB v. United Ins.*, 390 U.S. 254 (1968) and *United States v. W. M. Webb, Inc.*, 397 U.S. 179 (1970) for the legislative response to *Hearst* and *Silk*. This Court, in *Nationwide*, noted the Congressional response to its prior decisions and therefore, commencing in *Reid*, applied the "settled meaning" interpretation of "employee." In fact, given the opportunity to follow *Hearst*, this Court in *Nationwide* noted that *Reid* signalled the abandonment of construing the term "employee," "in the light of the mischief to be corrected." 503 U.S. ___, 117 L. Ed. 2d at 590-591 (1992)

If *Reid* did not signal the death of *Silk* and *Hearst*, then *Nationwide* did. There is nothing in ADEA to indicate any legislative intent to provide any interpretation of the term "employee" other than the common law. In fact, this Court in *Nationwide* distinguished *Rutherford, supra*, where the Court broadly interpreted FLSA because a legislative intent to broadly apply the Act was shown in that the Act

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the facts involved in the economic relationship." 322 U.S. at 129. In *Silk* (and *Bartels v. Birmingham*, 332 U.S. 126 (1947) a Social Security determination), this Court interpreted employee/independent contractor in light of the social ends to be achieved rather than the common law. See *Bartels*, 332 U.S. at 130; *Silk*, 331 U.S. at 710-711.

In *Nationwide*, this Court noted the prior application of the presumption of legislative intent in *Reid, supra*. Further, this Court in *Nationwide* recognized its abandonment of interpretation "in light of the mischief to be corrected and the end to be attained," and instituted the application of the common law agency test.

not only defined "employee" but "employ." *Nationwide* rejected the opportunity to interpret the ERISA "employee" as broadly as the FLSA employee.[19] While ADEA and FLSA have many similarities, Lorillard, the differences as to "employee" are of most importance.

Interestingly enough, this Court in *Lorillard*, *supra*, noting the distinctions between FLSA and ADEA, found the ADEA right to jury trial to exist in reliance upon FLSA. In fact, this Court found the right to jury trial to exist since Congress had not modified FLSA regarding enforcement techniques when enacting ADEA. This Court stated:

> "This selectivity that Congress exhibited [declining to incorporate some FLSA provisions in ADEA] in incorporating provisions and in modifying certain FLSA practices, strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully . . . FLSA" 434 U.S. at 582.

Glaringly absent from ADEA, but found in FLSA is the definition of "employ." Given *Nationwide*'s distinction regarding FLSA and the legislative intent, the common law test is not only appropriate, but required.

4. THE NEED FOR A PREDICTABLE TEST.

The "employee" issue in ADEA will be applicable in only those cases that represent something other than the traditional, 40 hours per week, payroll-paycheck worker. When the issue is raised, however, as in the present case, an "employer" is then left to face a jury determination of whether the individual he has been associated with for years is an "employee." This places an employer in a position of uncertainty and great jeopardy—forever.

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[19] The "employee" definition in FLSA, 29 U.S.C. §201; ADEA, 29 U.S.C. §621; Title VII 42 U.S.C. §2000e; and ERISA, 29 U.S.C. §1002, are identical; only FLSA defines "employ."

While the common law test is not absolute, it is a well recognized and time-tested rule. As noted in *Nationwide*, outside commission salesmen are considered to be independent contractors under the common law test. The "economic realities test," on the other hand, not only provides no predictability, but is a test that clearly allows a jury to view the parties in a manner in which they did not even view themselves. In fact, in determining the "employee" issue, the trial court jury instructions provided:

a. Broadly interpret the Act so as to effectuate the liberal purposes of these laws. (82a)

b. The manner in which the parties viewed their relationship is not determinative of the issue. (82a)

c. If there is a doubt or ambiguity in the matter, resolve it in favor of coverage. (83a)

d. Establishment of an independent contractor relationship requires a convincing accumulation of factors. (83a)

In addition to providing no guidance to an employer attempting to determine the status of its sales agents as employees or as independent contractors, the above instructions all but result in a directed verdict for the "employee". The instructions along with the application of the "economic realities test" left little doubt as to the jury verdict. These instructions are contrary to the clear meaning of the term "employee".

In *Nationwide*, this Court recognized the lack of predictability and uncertainty that occurs when the common law test is not applied. While the lower court in *Nationwide* did not expressly apply the "economic realities test," this Court did note that the legislative presumption required the application of the "common law test" rather than a subjective "expectation" test which was applied by the Court of Appeals. The underlying rationale controls; that is, the legislative intent mandates the common law test.

Applying the "economic realities test" would turn into an "employee" any individual who is dependent upon a company for all or a portion of his/her livelihood, while the traditional common law test would not. In fact, as stated by this Court in *Nationwide*:

> "Any such approach would severely compromise the capacity of companies like Nationwide to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be. To be sure, the traditional agency law criteria offer no paradigm of determinacy. But their application generally turns on factual variables within an employer's knowledge, thus permitting categorical judgments about the 'employee' status of claimants with similar job descriptions. Agency law principles comport, moreover, with our recent precedents and with the common understanding, reflected in those precedents, of the difference between an employee and an independent contractor."
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> 503 U.S. at ___ ; 117 L. Ed. 2d at 592.

Petitioner never viewed Respondent as a sales "employee." Petitioner did not hire Respondent to be an employee, and did not compensate him as an employee. Petitioner and Respondent never viewed each other in an employer-employee relationship. Despite these facts, a jury, some two years following Respondent's separation from Petitioner and under the "test" which neither Petitioner nor Respondent contemplated or agreed to, determined Respondent to be Petitioner's "employee."

There exists a need for certainty in the work place so that employers are able to determine their "employee" under a common, uniform usage, rather than a broad, liberal test that necessitates an "employee" relationship where one does not exist. The employer should not be forced to interpret a contractual arrangement for an out-

side salesman [and the rights/obligations that flow from such a relationship] "in the light of the mischief to be corrected and the end to be attained." Understanding this is difficult for lawyers; impossible for a layman.

Because of its predictability, the common law test is the only one that will lead to clear, proper and fair results. The important question of a predictable test in ADEA is now ripe for resolution. The Supreme Court should grant the Petition to address and to settle this vitally important area of federal age discrimination law.

B. A RETALIATION VERDICT DOES NOT AUTOMATICALLY MANDATE AN AWARD OF LIQUIDATED DAMAGES UNDER ADEA.

The trial court refused to instruct the jury[20] on the element of "willfulness," concluding that a verdict of retaliation would automatically include "willfulness." (86a-88a) The court thereafter awarded liquidated damages in favor of Respondent without a jury finding of "willfulness." The Sixth Circuit affirmed, stating, "under the facts of this particular case, we agree with the district court that a separate instruction was not necessary." (12a-13a)

In *Lorillard*, *supra*, this Court determined that the right to a jury trial exists in ADEA; clearly jury issues include "willfulness." While not defined in the Act, the "willfulness" standard that results in an award of liquidated damages has been interpreted by this Court, in *Thurston*, *supra*, to require a showing that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by ADEA."[21] *Thurston*,

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[20] The "willfulness" verdict occurred in the second trial where the jury found in favor of Petitioner on age discrimination and returned a verdict for Respondent on retaliation.

[21] ADEA coverage and a "willfulness" issue of course presupposes that the employer knew he was dealing with an employee. Due to the first verdict, the jury in the second trial was instructed that Respondent was an employee as a matter of law.

469 U.S. at 128-129. The *Thurston* court specifically rejected decisions of various circuits that a willfulness violation automatically exists whenever a discrimination verdict results. See *Thurston*, 469 U.S. at 128. *Thurston* expressly found the Congressional intent that the two-tiered liability theory of "willfulness" requires more than just an underlying violation of ADEA to justify a "willfulness" verdict. *Thurston*, 469 U.S. at 128. In fact, willfulness is a question of fact that concerns questions of the employer's state of mind, intent and belief, and knowledge. *E.E.O.C. v. Westinghouse Electric Corp.*, 725 F.2d 211 (1983)

While a variety of tests have been developed by the circuit courts in applying the *Thurston* test,[22] the Sixth Circuit has applied the "predominant factor" test. *Schrand v. Federal Pacific Electric Company*, 851 F.2d 152 (6th Cir. 1988); *Wheeler v. McKinley Enterprises*, 937 F.2d 1158 (6th Cir. 1991). The appropriate test to apply in ADEA need not be determined in this case; under the present facts, Petitioner was clearly entitled to a jury determi-

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[22] See *Dreyer v. ARCO Chemical Co.*, 801 F.2d 651, 658 (3d Cir. 1986), cert. denied, 480 U.S. 906 (1987) ("some additional evidence of outrageous conduct" to warrant the imposition of liquidated damages); *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), cert. denied, 493 U.S. 842 (1989) (evidence of "egregious" actions beyond ordinary age discrimination to permit the assessment of liquidated damages); *Schrand v. Pacific Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988) (a plaintiff may recover liquidated damages only if he proves that age was the "predominant factor" in the employer's discharge decision); *Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1224 (7th Cir. 1991) (to prove willfulness, a plaintiff "must provide evidence beyond that which would prove an ordinary claim of age discrimination"); *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989) (construing "willfulness" to require "direct evidence—more than just an inference from, say, an arguably pretextual justification—of age-based animus"); *Gilliam v. Armtex, Inc.*, 820 F.2d 1387, 1390-91 (4th Cir. 1987) (stating that evidence of age discrimination that is "too thin" will not sustain liquidated damages).

nation on the "willfulness" issue, a right that Petitioner was denied. (88a)

In addition, an employer is entitled to a "good faith" defense in "willfulness" actions. *Whitfield v. Knoxville*, 756 F.2d 455 (6th Cir. 1985); *Wheeler*, *supra*. By automatically awarding liquidated damages the trial court deprived Petitioner of a jury determination on a question of fact. While a retaliation finding, by itself, might suggest an automatic "willfulness" verdict, willfulness does not automatically follow a retaliation verdict, and the issue should have been presented to the jury.[23] The Petitioner's good-faith belief that the Respondent was not an"employee" must be considered as, and is, a proper defense to that claim. *Whitfield*, *supra*. Further, it is clearly supported by the evidence.

This Court in *Thurston* did not carve an exception for retaliation cases when it announced the Congressional two-tiered liability requirement. In fact, this Court in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) noted that if an employer acts unreasonably, but not recklessly, in determining its legal obligation, its actions will not be considered "willful." *Thurston* itself recognizes that actions in good faith do not constitute "willfulness". 469 U.S. at 129.

In denying Petitioner its right to trial and thereafter awarding automatic liquidated damages, the trial court (and presumably the Sixth Circuit, which was silent on its reasoning) (12a-13a), relied upon *Powell v. Rockwell International*, 788 F.2d 279 (5th Cir. 1986) and *Rose v. Hearst Magazine Division*, 814 F.2d 491 (7th Cir. 1987).

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[23] When the "employee" issue had been determined in the first trial, Petitioner was allowed to testify [in the second trial] as to his belief to justify the propriety of his acts. Petitioner never viewed Respondent as an "Employee." To automatically award liquidated damages under *Thurston* is clearly inappropriate.

In *Powell*, although the court upheld a "willfulness" award, the claim was submitted to a jury. The issue on appeal was the sufficiency of the jury instruction on willfulness. The appellate court found the instruction to have been erroneous in light of the *Thurston* decision. However, the court upheld the verdict and stated:

> "In the context of the present facts, however, the correct instruction would have made no difference in the outcome of the case. The jury specifically found that Rockwell terminated Powell in retaliation for filing his ADEA claim. McCann, a Rockwell official, testified that he knew that retaliatory discharge was a violation of the law. In any event, if Rockwell officials did not "know" that firing an employee in retaliation for filing an ADEA claim was illegal, then that action was certainly 'reckless.' In the context of the present facts,therefore, the jury finding of retaliatory discharge necessarily found 'willfulness' as defined by *Thurston*."
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> 788 F.2d at 286.

The court further found a "good faith" defense to be unavailing in light of the jury verdict of retaliation, and due to the facts in the case. The *Powell* decision is distinguishable, as the jury expressly rejected both the employer's defense and, upon the facts, the good faith defense to the alleged retaliation. In the instant case, not only did Petitioner dispute the facts leading to the July 13, 1987 separation, Petitioner believed in good faith that he was not dealing with an "employee". This issue was never presented to the jury. *Powell* simply does not apply the Sixth Circuit test.

In *Rose*, the jury returned a verdict of retaliation for plaintiff but found the violation not to be willful. On appeal, the court reversed for new trial as the verdicts were in-

consistent. 814 F.2d at 493. In *Rose*, the employer chastised Rose for filing an age discrimination complaint and fired him one week later. Rose was an employee. The *Rose* court did not order a verdict of willfulness; it remanded for new trial. The facts in the present case are clearly distinguishable. The trial court denied Petitioner its right to jury trial.

In the present case, a good-faith defense is factually supported since Mr. Sawdon testified that he did not believe Respondent was an employee of BTM.[24] While the jury verdict on retaliation implies a rejection of Petitioner's version of the events of July 10, 1987, the jury did not hear the good faith defense; i.e., that willfulness, could not exist since Mr. Sawdon did not consider Respondent an employee, nor subject to ADEA coverage. The jury was never given the opportunity to consider this defense.

The trial court's award of liquidated damages amounted to a directed verdict on that issue. Fed.R.C.P. 50. It is obvious that the court's rationale was based on Rule 50, since a right to jury trial exists, *Lorillard*, and thus the Rule 50 test applies.

Pursuant to Fed.R.C.P. 50, it is clear that the trial court was:

> "Bound to view the evidence in the light most favorable to [Petitioner] and to give it the benefit of all inferences which the evidence clearly supports, even though contrary inferences might reasonably be drawn."
>
> *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962).

In fact, not only is the trial court precluded from weighing the evidence under Rule 50, but the court is required to

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[24] The issue of "employee" was submitted to and decided by the jury in the first trial.

draw all factual inferences in favor of the non-moving [Petitioner] party. *Lytle v. Household Manufacturing*, 394 U.S. 545 (1990).

In light of the two-tiered liability requirements for willfulness under *Thurston*, the right to jury trial under *Lorillard*, the good-faith defense under *Whitfield*, and the standards of Fed. R.C.P. 50, upon application of those facts, the Supreme Court should grant this Petition to reconcile the conflict this decision presents as to a jury right in retaliation actions and the proper law applicable to liquidated damages claims under ADEA.

CONCLUSION

This case presents a simple question as to the applicable standard for determination of who is an "employee" pursuant to ADEA and correspondingly, the Michigan Elliott-Larsen Act. It thus raises the question of whether the common-law agency test as applied by Justice Souter in *Nationwide Mutual Insurance Company v. Darden* and by Justice Marshall in *Community for Creative Non-Violence v. Reid* is applicable in ADEA actions; or whether the "economic realities test" (or the "hybrid test"), as developed from this Court's decades-earlier decisions in *NLRB v. Hearst Publications, Inc.* and *United States v. Silk*, is the applicable test.

Further, this Petition challenges whether a jury verdict of retaliation under 29 U.S.C. §621, mandates an automatic judicial finding of "willfulness" and therefore liquidated damages, 29 U.S.C. §626, thus depriving an employer of its right to trial by jury.

Employers need to know when ADEA coverage applies to an agent and when it does not—exactly the same as with ERISA. They need to know whether the outside salesperson is an independent contractor or not. Clarity and predictability are especially important for small businesses, so that they can readily and easily follow the correct rules.

Nationwide has settled the question for ERISA. This case will settle the same question for ADEA. *Nationwide* confirms that the common law test is the correct test under that statute. To reach a different conclusion for ADEA would undermine the positive change that *Nationwide* has accomplished. Employers are further entitled to jury determinations of "willfulness" before punitive liquidated damages are awarded. This is especially true in a case where the individual's employment is in dispute. Accordingly, a Writ of Certiorari should issue to review the decision below.

Respectfully submitted,

DAVID R. HEYBOER
(Counsel of Record)
LUCE, HENDERSON, HEYBOER, LANE, BURLEIGH, CURRIER & MARTINEK
933 Pine Grove Avenue
P.O. Box 610944
Port Huron, MI 48061-0944
(313) 985-3333

Attorney for Petitioner BTM Corporation

Dated: July 28, 1992

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 91-1063/1100/1398

ROBERT LILLEY,
Plaintiff-Appellant, Cross-Appellee,
v.

BTM CORPORATION,
Defendant-Appellee, Cross-Appellants.

On Appeal from the United States District Court for the Eastern District of Michigan

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Decided and Filed March 12, 1992

Before: RYAN and SUHRHEINRICH, Circuit Judges; and PECK, Senior Circuit Judge.

SUHRHEINRICH, Circuit Judge, Robert Lilley brought an action against BTM Corporation ("BTM") alleging age discrimination and retaliatory discharge in violation of the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and Michigan's Elliott-Larsen Act, Mich. Comp. Laws § 37.2101 et seq.; willfulness under state and federal law with respect to both age discrimination and retaliatory discharge; discharge in breach of an employment contract; and failure to pay commissions owed ("procuring cause"). BTM defended that Lilley was not an employee under the discrimination statutes. Prior to the first trial, the district court dismissed the breach of em-

ployment contract claim. At the conclusion of the evidence, the court granted a directed verdict in favor of BTM on the procuring cause claim. The jury found that Lilley was an employee of BTM, returned a general verdict in Lilley's favor on the age discrimination, retaliatory discharge, and willfulness claims, and awarded damages for back pay, front pay, and mental anguish totaling $800,000. The court accepted the jury's finding on employment status but ordered a new trial on the issues of age discrimination, retaliatory discharge, willfulness, and damages. The second jury returned a general verdict in favor of BTM on the age discrimination and in favor of Lilley on the retaliatory discharge claim and awarded damages of $186,000. The court ordered a new trial on the issue of damages for retaliation. The third jury awarded Lilley liquidated damages, attorney's fees, costs, and prejudgment interest and entered final judgment in the amount of $600,551.04. Lilley appeals the directed verdict on his procuring cause claim, the grant of a new trial after the first trial of his age discrimination claim, the second jury's verdict on age discrimination, claiming it resulted from judicial bias, the denial of prejudgment interest, and the district court's computation of attorney's fees and costs. BTM cross-appeals the determination that Lilley was an employee, the award of liquidated damages, and the award of mental anguish damages.

We affirm in part and reverse and remand in part.

I

BTM President Edwin Sawdon offered Lilley a position selling BTM's products for a five percent commission on sales. Lilley agreed and became the only BTM employee compensated on straight commission. After receiving several large commissions, Lilley began to discuss retirement with the other members of BTM's sales staff, Steve Sawdon and Andy Janiszewski, and eventually announced to

Ed Sawdon his intention to retire effective as of October 1987.

One of Lilley's projects involved a large sale to General Motors CPC-Parma. Ed Sawdon came to doubt Lilley's ability to close this deal because of his lack of engineering experience. Ultimately, Sawdon removed Lilley from this project, remarking that Lilley was "confused" and "losing it." A number of other projects that Lilley was counting on fell through, and he realized that he would not be able to retire in October 1987 as planned. Lilley informed Sawdon of this sometime in early 1987. During this time Sawdon and Lilley began to argue over commissions that Lilley claimed were owed him.

On May 4, 1987, BTM announced a new policy that, beginning in October 1987, it would no longer sell its metal joining systems through distributors or "five percenters." This policy was never implemented as to distributors, and Lilley was the company's only five percenter. The new policy had the effect of eliminating Lilley's job. The October effective date of the policy was chosen due to Lilley's previously expressed intent to retire at that time.

On July 8, 1987, Lilley filed an age discrimination complaint with the Equal Employment Opportunity Commission. On July 10, Lilley asked Sawdon to reconsider the new policy. When Sawdon refused, Lilley informed him of the discrimination complaint. Sawdon immediately terminated Lilley.

II

A

BTM argues that Lilley was not an employee. The jury disagreed.[1] BTM then moved unsuccessfully for judgment notwithstanding the verdict.

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[1] The determination of employment status is a mixed question of law

The term "employee" is to be given a broad construction in order to effectuate the remedial purposes of the ADEA.[2] This circuit employs the economic realities test to determine whether an employment relationship exists for the purposes of the ADEA. *See Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983). This test, developed under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203 et seq., looks to whether the putative employee is economically dependent upon the principal or is instead in business for himself. *See Dole v. Snell*, 875 F.2d 802, 804 (10th Cir. 1989); *Mednick v. Albert Enters, Inc.*, 508 F.2d 297, 300 (5th Cir. 1975); *cf. Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). This test is a loose formulation, leaving the determination of employment status to case-by-case resolution based on the totality of the circumstances. *See Armbruster*, 771 F.2d at 1339-40.

BTM exercised control over Lilley. Although Lilley set his own hours and vacation schedule, such flexibility is not sufficient to negate control. *See, e.g., Snell*, 875 F.2d at 806. BTM had the authority to remove Lilley from particular sales. In at least one instance, BTM exercised this authority, removing Lilley from a deal while negotiations

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and fact. Normally, a judge will be able to make this determination as a matter of law. However, where there is a genuine issue of fact or conflicting inferences can be drawn from the undisputed facts, as here, the question is to be resolved by the finder of fact in accordance with the appropriate rules of law. *See Martin v. United Way*, 829 F.2d 445, 451 (3d Cir. 1987).

[2] 29 U.S.C. § 621 et seq. The provisions of the ADEA generally receive an identical interpretation to corresponding provisions of Title VII. *See, e.g., Coburn v. Pan Am*, 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983); *EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983). Moreover, ADEA standards governing employment status also apply to Michigan's Elliott-Larsen Act, Mich. Comp. Laws § 37.2101 et seq. *Falls v. Sporting News Publishing Co.*, 834 F.2d 611, 613 (6th Cir. 1987). Therefore, our analysis applies equally to Lilley's claims under federal and Michigan law.

were still taking place and replacing him with another employee. In addition, BTM required Lilley to obtain its approval before he could quote a price to a potential buyer.

Although he paid some of his own expenses, Lilley did not make an investment in the business. BTM supplied Lilley with an office, secretarial services, business cards and stationery bearing BTM's name, brochures and stickers advertising BTM's products, and telephone privileges.

In addition, Lilley was integrated into BTM's normal business operations. After BTM approved a price quotation, Lilley was authorized to sign for and bind BTM. He also attended weekly meetings of BTM's sales staff, whose members are undisputedly employees. Lilley went on "troubleshooting" trips, involving the resolution of problems that customers had with BTM's products *after* purchase. Finally, BTM invited its customers to visit its facility and offered that "our people will give you all the help you need . . . ." Lilley was listed among BTM's "people."

It is also significant that Lilley sold only BTM's products. Although this is by no means determinative, it provides support for the existence of an employment relationship, particularly when viewed within the totality of the facts of this case.

In light of the totality of circumstances in this case, there was sufficient evidence to raise a question for the jury. The district court properly denied BTM's motion for judgment notwithstanding the verdict.

B

BTM moved for a new trial on the grounds that the jury was instructed erroneously regarding Lilley's status as an employee and that prejudicial evidence was admitted on this issue. First, BTM contends that the following instruction misled the jury as to which party bore the burden of proof:?

> If there is a doubt or ambiguity in the matter, you should resolve it in favor of coverage. Establishment of an independent contractor relationship requires a convincing accumulation of factors indicating that Robert Lilley's services were rendered in pursuit of his separate business enterprise of selling those services.
>
> If you find, based upon the preponderance of the evidence, that Robert Lilley was an employee of BTM, then he is within the protection of the federal law and the state law.

The instruction that "[e]stablishment of an independent contractor relationship requires a convincing accumulation of evidence" is a direct quotation of this circuit's rule. *See Falls,* 834 F.2d at 614.

BTM also challenges the instruction that doubt be resolved in favor of coverage. This portion of the instruction may have been ambiguous but the effect of the charge as a whole was not misleading. *See Howard v. Chesapeake & Ohio Ry. Co.,* 812 F.2d 282, 287 (6th Cir.), *cert. denied,* 484 U.S. 820 (1987). The instruction on ambiguity was followed by an instruction that the plaintiff bears the burden of proof of employment status by a preponderance of the evidence. In addition, this was succeeded by a discussion of the ADEA itself that in five instances refers to Lilley as bearing the burden of proof. Viewing the charge as a whole, the district court did not abuse its discretion.

III

Lilley argues that the district court erred in directing a verdict in favor of BTM on its procuring cause claim. Michigan law provides:

> [T]he agent is entitled to recover his commission whether or not he has personally concluded and completed the sale, it being sufficient if his ef-

> forts were the procuring cause of the sale. . . . [I]f the authority of the agent has been cancelled by the principal, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause.

Reed v. Kurdziel, 352 Mich. 287, 294-95, 89 N.W.2d 479 (1958). An agent may recover a commission for customer procurement or sales procurement. Customer procurement allows an agent to recover a commission for all sales to a customer that the agent procured regardless of whether the agent was involved in the particular sale. Sales procurement allows an agent to recover a commission only on the specific sales that the agent procures. Subsequent sales to the same customer that are not procured by the agent do not yield a commission. Whether an agent is entitled to commissions on a customer procurement or sales procurement basis is determined by the contract between the agent and the principal. *See Butterfield v. Metal Flow Corp.*, 185 Mich. App. 630, 462 N.W.2d 815 (1990); *Shortt v. Centri-Spray Corp.*, 369 Mich. 303, 308, 119 N.W.2d 528 (1963).

The district court ruled that there was no evidence of a customer procurement contract between Lilley an BTM, or of any unpaid sales procurement commission, and granted a directed verdict to BTM. There is no dispute that Lilley was to receive commissions on the sales that he procured. The dispute is whether he would continue to receive commissions for subsequent sales to the customer in which he was not involved.

Lilley testified that he believed he would receive commissions for customers procured but presented no evidence to support this subjective belief. Michigan adheres to the objective theory of contracts. As a result, Lilley's subjective intent or belief is irrelevant. *Banque de Depots v. National Bank of Detroit*, 491 F.2d 753, 756 (6th Cir. 1974); *Heritage Broadcasting Co. v. Wilson Communica-*

tions Inc., 170 Mich. App. 812, 818, 428 N.W.2d 784 (1988).

Lilley asserts that BTM's Answer to his Complaint contains an admission that the parties had a customer procurement contract. The substance of BTM's Answer is that Lilley was paid on a commission basis. The allegation in Lilley's Complaint to which BTM was responding dealt only with the general form of Lilley's compensation, rather than the details of his commission. Where the pleadings do address the terms of the commission, BTM's answer is clear and consistent in contending that commissions were to be based on sales procurement.

IV

A

The court granted BTM's motion for a new trial on the age discrimination[3] claim on two grounds: insufficient evidence and the admission of irrelevant evidence. Because we hold that the plaintiff presented insufficient evidence to establish a prima facie case of age discrimination and

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[3] The relevant portion of the ADEA reads: It shall be unlawful for an employer—

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C. § 623(a). The relevant portion of the Elliott-Larsen Act reads:

> (1) An employer shall not:
>
> (a) Fail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Mich. Comp. Laws § 37.2202(1)(a).

that j.n.o.v. should be granted, we do not consider the admission of irrelevant evidence.

In an age discrimination case, the plaintiff bears the burden of proving a prima facie case and, at all times retains the burden of persuasion as to the ultimate issue of discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-53 (1981). A plaintiff may prove a prima facie case of age discrimination by establishing that:

> (1) he was a member of the protected class [over age 40];
>
> (2) he was subjected to adverse employment action;
>
> (3) he was qualified for the position;
>
> (4) he was replaced by a younger person.

Simpson v. Midland-Ross Corp., 823 F.2d 937, 940 (6th Cir. 1987); *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

There is no dispute that Lilley satisfies the first three of these criteria. However, Lilley was not replaced. After he was terminated in July 1987, his duties and accounts were assumed by BTM's remaining sales staff. Spreading the former duties of a terminated employee among the remaining employees does not constitute replacement. It is not disputed that, at the time of Lilley's termination, there was a downturn in the market for BTM's products and several large orders that Lilley had worked on were canceled. In April 1988, BTM hired Steven Boehm, then age twenty-nine, to work on its sales staff. The fact that nine months later business had picked up to the extent that another employee was needed in the sales department does not mean that Boehm replaced Lilley in any sense relevant to inferring age-based discrimination. *Cf. Simpson,* 823 F.2d at 941 (three month interval "substantially weaken[s]" the inference).

Lilley also contends there was direct evidence of age discrimination in that BTM took an adverse employment action against him on the basis of his decision to retire. In 1986, Lilley informed Ed Sawdon of his intent to retire effective in October 1987. Thereafter, Lilley notified BTM that he no longer intended to retire. BTM then announced its policy that eliminated Lilley's position as of his initial retirement date. Lilley argues that this policy was directed at him and was issued in response to his decision not to retire. Lilley claims the institution of this policy constitutes an adverse employment action based upon his decision to retire and is direct evidence of age discrimination.

This argument is flawed. Although BTM's termination of Lilley through the new policy coincided *temporally* with Lilley's announced retirement, there is no evidence that they coincided *causally*—that BTM terminated Lilley because of the announcement. Lilley's reliance on *EEOC v. Community Unit School Dist. No. 9*, 642 F. Supp. 902 (S.D. Ill. 1986), is misplaced as that case involved a causal relation. In *Community Unit*, two school administrators announced their intention to retire. Because of this announcement, the school board decided to effect a necessary budget cut by reassigning these administrators at lower pay. *Community Unit* would be on point if BTM had decided tht it had to terminate one employee and that since Lilley had announced his retirement he would be the one chosen. Because Lilley failed to establish a prima facie case of age discrimination, the district court should have granted BTM's motion for j.n.o.v. on this claim. We, therefore, affirm the judgment that ultimately was entered in favor of BTM on the issue of age discrimination.

B

Finally, Lilley challenges the district court's grant of a new trial on the issue of willfulness after the first trial. Since the first jury returned a general verdict, it is impossible to determine whether its finding pertained solely

to the retaliatory discharge claim, solely to the discrimination claim, or to both. Because Lilley failed to present sufficient evidence of age discrimination, a finding of willfulness solely as to this claim would, a fortiori, be unsupported. Given the indefiniteness of the first jury's verdict on willfulness, the court properly ordered a second trial on the issue of willfulness.

V

Lilley claims that the district judge was biased against him and denied him a fair second trial. First, Lilley cites a comment by the judge, made out of the hearing of the jury, that Lilley should have been more enthusiastic about settling the case and another comment, again made out of the hearing of the jury, that Lilley's theory of pretext was attenuated.

Lilley relies on *Anderson v. Sheppard,* 856 F.2d 741 (6th Cir. 1988), which held that judges must avoid the appearance of bias as well as actual bias. *Anderson* involved a trial judge who told the plaintiff that he should have accepted the settlement offer and that he had a weak case. The judge had conducted the settlement conference and, in his own words, had "egg on [his] face" because his previous dismissal of the case was reversed. *Id.* at 742-44. We held that the district judge abandoned his role as impartial arbiter and "assumed the posture of an advocate." *Id.* at 747.

This case is distinguishable from *Anderson.* The district judge did not mediate the settlement discussions. There was no other factor that might create an appearance that the judge had abandoned his role or that his comments were offered other than as an impartial observer. *See Patrick v. City of Detroit,* 906 F.2d 1108 (6th Cir. 1990).

Lilley also claims that several erroneous rulings show judicial bias. Assuming arguendo that the rulings were erroneous, there is no indication that they resulted from

bias or gave the appearance that the district judge was biased. Finally, Lilley complains that the jury laughed during his testimony. However, Lilley offers no connection between the laughter and judicial bias.

The charge of judicial bias is a serious one indeed. The ability of the judiciary to fulfill its constitutional function rests upon the maintenance of impartiality. We will not ascribe bias to a district judge in the absence of evidence that he has abandoned his role as an impartial arbiter. Lilley has failed to make such a showing.

VI

A plaintiff may recover liquidated damages "only in cases of willful violations," 29 U.S.C. § 626(b). BTM requested that the trial court give a separate jury instruction regarding willfulness. The district court refused, ruling that retaliation[4] automatically includes willfulness. Under the

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[4] The relevant portion of the ADEA reads:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an emloyment agency to discriminate against any individual, or for a labor organization to discriminate against any member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d). Michigan law provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employer, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political

facts of this particular case, we agree with the district court that a separate instruction was not necessary.

VII

A

The recovery of mental anguish damages is permitted under the Elliott-Larsen Act. *Slayton v. Michigan Host*, 122 Mich. App. 411, 417, 322 N.W.2d 498 (1983). Lilley submitted such a claim and ultimately was awarded $350,000. Lilley testified to his feelings of anguish and embarrassment following his discharge, and his wife corroborated this testimony. He also underwent treatment with a psychiatrist, Dr. Marble. Lilley testified that he was unable to secure employment, that the discharge had an adverse effect on this marriage, and that he lost weight and had difficulty sleeping. This constitutes greater evidence than was present in *Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201 (6th Cir. 1990)(upholding mental anguish damages), andBTM's claim that there was insufficient evidence of mental anguish is unavailing.[5]

B

BTM next argues that the amount of the verdict is excessive. This determination lies within the sound discretion of the district court. *Moody*, 915 F.2d at 211. In the first trial, the jury awarded Lilley $250,000 in mental an-

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> subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

Mich. Comp. Laws § 15.361.

[5] BTM challenges the failure to grant judgment notwithstanding the verdict on mental anguish damages at each trial. As BTM admits, the evidence was substantially identical at each. Therefore, the district court's ruling was correct in each instance.

guish damages. At the second trial, the verdict form submitted to the jury failed to provide for the assessment of mental anguish damages and none were awarded. The jury in the third trial awarded $350,000 in compensation for mental anguish. The district court entered this verdict. We find it noteworthy that two separate juries heard nearly identical evidence on this issue and returned similar verdicts.

Our determination is to be guided by awards upheld in similar cases. *Id.* The verdict in this case is "within the realm of other verdicts" that hve been upheld in similar cases. *See id.* (affirming a verdict of $150,000 for mental anguish suffered as a result of discrimination)(citing *Wilson v. General Motors Corp.*, 183 Mich. App. 21, 31, 454 N.W.2d 405, 415 (1990)(affirming $375,000 award); *Jenkins v. American Red Cross*, 141 Mich. App. 785, 798-99, 369 N.W.2d 223, 230 (1985)(affirming $500,000 award)). Based on the foregoing considerations, the award in this case was not excessive.

BTM also contends that the verdict was the result of passion and prejudice. BTM cites the opening statement of Lilley's counsel at the third trial, in which he referred to BTM as having been found "guilty" of retaliation. The district court, however, gave a limiting instruction and cut short the plaintiff's opening statement. These curative actions effectively eliminated any prejudice.

VIII

The jury returned a general verdict of liability on Lilley's claim of retaliatory discharge. Retaliation is prohibited under both the federal ADEA and Michigan's Elliott-Larsen Act and Lilley brought claims under both statutes. However, the jury's general verdict did not specify the statute under which it found BTM liable. The ADEA bars plaintiffs from recovering prejudgment interest while the Elliott-Larsen Act permits recovery of prejudgment inter-

est from the date the complaint is filed. Mich. Comp. Laws § 600.6013 (providing prejudgment interest on all damage recoveries in civil actions); *Brunson v. E&L Transport Co.*, 177 Mich. App. 95, 107, 441 N.W.2d 48 (1989)(applying prejudgment interest from date of complaint to date of recovery under Elliott-Larsen Act). The district court denied Lilley's request for prejudgment interest.

BTM argues that the district court's ruling on prejudgment interest was correct, citing *Wojtkowski v. Cade*, 725 F.2d 127 (1st Cir. 1984)(plaintiff's request for prejudgment interest denied because the court was unable to determine whether the basis for the jury's award was state or federal law).

In contrast to *Wojtkowski*, the state and federal claims here are both for retaliatory discharge and involve substantially identical elements. *Compare Wentz v. Maryland Casualty Co.*, 869 F.2d 1153, 1154-55 (8th Cir. 1989)(elements of the ADEA), *with Kocenda v. Detroit Edison Co.*, 139 Mich. App. 721, 726, 363 N.W.2d 20 (1984)(elements of Elliott-Larsen). Since it is not possible for a jury to find a retaliatory discharge under the ADEA without also finding retaliation under the Elliott-Larsen Act, the district court erred in denying prejudgment interest. *See Bailey v. Container Corp. of America*, 660 F., Supp. 1048 (S.D. Ohio 1986) (awarding prejudgment interest after general verdict finding age discrimination.

Finally, BTM contends that Lilley cannot receive both liquidated damages and prejudgment interest. The Supreme Court has held that under the Fair Labor Standards Act a plaintiff cannot recover both liquidated damages and prejudgment interest. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). This circuit has applied that ruling to the ADEA; thus, a plaintiff cannot recover both liquidated damages and prejudgment interest under the ADEA, *Rose v. National Cash Register Corp.*, 703 F.2d 225, 230 (6th Cir. 1983). However, the prejudgment interest here

is awarded under Michigan's Elliott-Larsen Act while liquidated damages fall under the ADEA.

These awards are not duplicative. Under the ADEA, liquidated damages are punitive. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985). Michigan holds prejudgment interest to be compensatory. *Osinski v. Yowell*, 135 Mich. App. 279; 354 N.W.2d 318 (1984); *Foremost Life Ins. Co. v. Waters*, 125 Mich. App. 799, 337 N.W.2d 29 (1983). Thus, Lilley may recover both.

IX

The Supreme Court has ruled that "the district court has discretion in determining the amount of a fee award." *Hensley v. Eckerhrt*, 461 U.S. 424, 437 (1983). There is no precise formula for determining the amount of a fee award, but the district court is to be guided by the degree of success achieved through litigation. *Id.* at 436-37. The district court determined that Lilley achieved limited success at trial. We agree. While Lilley only succeeded in proving retaliatory discharge, this is sufficient to render him a "prevailing party" eligible to recover reasonable attorney's fees, *see id.* at 433.

Lilley claims that the district court erred in failing to award the full fees it requested. Lilley submitted exhibits claiming recovery from $60 to $210 per hour over a total of 3,500 hours. The district court ruled that it was only reasonable for one attorney to have worked on this case for 525 hours at a rate of $125 per hour. Although the district court did not follow the generalized framework that the Supreme Court set forth in *Hensley*, we cannot say its result was reached in error.

Lilley also requested $47,103.48 in litigation expenses. Lilley itemized this request but failed to correlate the individual expenses to specific claims. The district court refused to consider the expenses "item-by-item," rejected all expenses on unsuccessful claims, including age discrimi-

nation, and arbitrarily allowed $7,500 in expenses. This determination is clearly erroneous. The district court reduced the award partly on the basis of expenses incurred in pursuing the age discrimination claim. This claim was related to the retaliatory discharge claim and expenses incurred in pursuing it are recoverable under *Hensley*. The district court itself did not reduce the attorney's fee award for time spent on the age discrimination claim, and it would have been erroneous to have done so. Moreover, the district court failed to justify its award in terms of Lilley's overall success. Thus, the district court erred in fixing the litigation expense award.

X

We affirm the judgment of the district court as to employment status; procuring cause; age discrimination and retaliation, under both 29 U.S.C. § 621 *et seq.* and Mich. Comp. Laws 37.2101 *et seq.;* willfulness and liquidated damages; attorney's fees; and mental anguish. We reverse the judgment of the district court as to prejudgment interest and costs and remand for recomputation, by the court, of costs and assessment of prejudgment interest.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No: 91-1063: 91-1100: 91-1398:

ROBERT LILLEY,
Plaintiff-Appellant Cross-Appellee,
v.

BTM CORPORATION,
Defendant-Appellee Cross-Appellant.

FILED

MAR 12 1992

LEONARD GREEN, Clerk

Before: **Ryan,** and **Suhrheinrich,** Circuit Judges; **Peck,** Senior Circuit Judge

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is reversed as to prejudgment interest and costs and remanded for computation by the court, of costs and assessment of prejudgment interest. IT IS FURTHER ORDERED that the judgment of the district court is affirmed in all other respects in accordance with the opinion.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Issued as Mandate: 5-06-92

A True Copy.

COSTS: None

Attest:

Filing Fee ..... $/s/ Shawn R. Pellauge
Printing ..... $
Total ..... $

Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 91-1063/1100/1398

ROBERT LILLEY,
Plaintiff-Appellant/Cross-Appellee,
v.

BTM CORPORATION,
Defendant-Appellee/Cross-Appellant,.

FILED

APR 29 1992

LEONARD GREEN, Clerk

ORDER

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and PECK, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HON. AVERN COHN

Case No. 87-CV-30088

ROBERT LILLEY,

Plaintiff,

vs.

BTM CORPORATION,

Defendant.

FINAL JUDGMENT

This action came before the Court and a jury. The issues have been tried and the jury rendered a verdict in favor of Plaintiff Robert Lilley in the amount of $425,000. The Court further awards Plaintiff Robert Lilley Liquidated Damages in the amount of $75,000 under the Age Discrimination in Employment Act, 29 U.S.C. §626(b), and Prejudgment Interest in the amount of $100,551.04 under MCLA §600.6013(6).

IT IS ORDERED AND ADJUDGED that the October 10, 190 Judgment is hereby amended and that the Plaintiff Robert Lilley recover from the Defendant the sum of six hundred thousand five hundred fifty one dollars and four cents ($600,551.04).

Dated: DEC 20 1990

/s/ Avern Cohn
UNITED STATES DISTRICT JUDGE

I hereby certify that the proceeding is a true copy of the original on file in this Court.

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

By: _____
Deputy

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO. 87-CV-30088 PH

ROBERT LILLEY,

Plaintiff,

-vs-

BTM CORPORATION, a Michigan Corporation,

Defendant.

FILED-CLERK
UNITED STATES DISTRICT COURT

MAR 23 1989

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MEMORANDUM OPINION AND ORDER

At a session of said Court held in the Federal Building, Port Huron, Michigan on the 23rd day of March, 1989.

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This matter is before the Court on the defendant's motion for summary judgment. The plaintiff filed suit arising out of the discontinuance of his relationship as a sales representative for the defendant, alleging violations of the

Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and Michigan's Elliott-Larsen Civil Rights Act (Elliott-Larsen), Mich. Comp. Laws Ann. § 37.2101 *et seq.*, wrongful discharge, and failure to pay commissions. In support of its motion, the defendant argues (1) that the plaintiff cannot recover damages incurred after October 29, 1987, the effective date of the plaintiff's allegedly valid resignation from the defendant; (2) that plaintiff cannot recover for either age discrimination or retaliatory discharge since plaintiff was not an "employee" of the defendant; (3) hat plaintiff has failed to establish a *prima facie* claim of age discrimination under the ADEA; (4) that the plaintiff, being an "at-will" employee, cannot recover for wrongful discharge; and (5) that the express agreement between the plaintiff and the defendant concerning commission earnings precludes the plaintiff from asserting claims under theories of procuring cause, implied contract, quantum meruit, and unjust enrichment. The Court need only address the defendant's argument concerning the plaintiff's employment status.

I.

The undisputed facts of this case are few. In 1982, the parties entered an agreement whereby the plaintiff, for a commission based upon sales, would represent the defendant in locating customers for the defendant's metal fastening systems. Sometime around 1984, the defendant granted the plaintiff a one-year right to sell on commission a new product, in addition to the products plaintiff already handled.

The plaintiff subsequently made plans to sail around the world, with a departure date set in October of 1987. The plaintiff contends that these plans were contingent upon certain financial goals being met, goals that depended upon the culmination of pending sales projects. The defendant, however, urges that the plaintiff's intent to embark on the cruise was presented as an offer of resignation, which

the defendant thereafter accepted. The alleged conditions for plaintiff's expedition never occurred, and plaintiff informed the defendant of his desire to remain as a sales representative. The defendant maintained its understanding that the plaintiff would leave its employ in October of 1987, and informed the plaintiff of this position.

On July 8, 1987, the plaintiff filed an age discrimination claim with the Michigan Department of Civil Rights. On July 10, 1987, the plaintiff and his wife met with defendant's representative, Ed Sawdon, to discuss the situation. The following Monday, July 13, 1987, the defendant discharged the plaintiff. The next day, the plaintiff filed a retaliatory discharge claim with the Michigan Civil Rights Commission. On December 29, 1987, this litigation began.

II.

In determining whether summary judgment is appropriate, the Court must be satisfied that no genuine issue of material fact exists, and that absent any such issue judgment may be entered as a matter of law. Fed. R. Civ. P. 56(c). The movant bears the burden of informing the Court of the basis for its motion, yet is not required to provide materials negating an opponent's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Once the movant satisfies this initial requirement, "there is no issue for trial unless thee is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party," and "[i]f [such] evidence is merely colorable, . . . , or is not significantly probative, . . . , summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citations omitted).

III.

At the threshold, we must determine the merit of the defendant's contention that the plaintiff was not defendant's "employee" as required under the ADEA and

Elliott-Larsen. Concerning the Elliott-Larsen Act, Michigan courts expressly follow the "economic realities" test, discussed *infra*, to determine a plaintiff's status. In applying the ADEA, however, the federal judiciary has yet to agree upon a single method for determining the existence or nonexistence of employee status. The central conflict arises from the use of differing standards, those being the "economic realities" test and a hybrid of the "economic realities" test and the common-law "right-to-control" test, in determining the coverage of various pieces of social legislation. *See e.g., Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981) (use of "economic realities" test proper in Fair Labor Standards Act (FLSA) cases); *Unger v. Consolidated Foods Corp.*, 657 F.2d 909 (7th Cir. 1981) (hybrid test proper in Title VII litigation). In *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32 (3rd Cir. 1983), the Third Circuit, upon weighing the similarities and differences between the ADEA and both the FLSA and Title VII, concluded that because the substantive aspects of the ADEA are more closely akin to those of Title VII, use of the hybrid test for ascertaining employee status was correct in ADEA cases. *Id.* at 38.

To date, the Sixth Circuit has indicated a preference for the broader "economic realities" test in evaluating a plaintiff's status as an employee. In *EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068 (6th Cir. 1982), the court stated that "[w]hen interpreting the term 'employee' in social welfare legislation such as the ADEA, Title VII, the Fair Labor Standards Act and the National Labor Relations Act, courts have used a broad definition so as to effectuate the stated purposes of these Acts." *Id.* at 1070 (citations omitted). Likewise, in *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983), the court adopted the economic realities standard in a Title VII case, finding that the express exclusion of independent contractors from coverage under the National Labor Relations Act did not necessarily require a narrower interpretation of "em-

ployee' for Title VII purposes." In that Congress was specifically aware of the judicial construction accorded the term "employee" absent an *explicit* limitation, we now refuse to *imply* such a restriction into the otherwise broad terms of Title VII." *Id.* at 1341 (footnote omitted; emphasis in original).

Notwithstanding the fact that this circuit has apparently not addressed the issue following the Third Circuit's *Zippo* opinion, we believe that the use of the "economic realities" test in ADEA litigation, supported by *First Catholic* and *Armbruster,* remains binding. Admittedly, at least one district court within the Sixth Circuit has adopted *Zippo's* reasoning. *See Dake v. Mutual of Omaha Ins. Co.,* 600 D. Supp. 63, 65 (N.D. Ohio 1984). Until such time as the court of appeals expressly renounces its earlier application of the "economic realities" test in ADEA and Title VII cases, however, we decline the opportunity to follow the *Dake* court's lead.

Under the federal version of the "economic realities" test, courts consider the "degree of [economic] dependence of alleged employees on the business with which they are connected" in determining employee status. *Zippo, supra* at 37, quoting *Usery v. Pilgrim Equipment Co., Inc.,* 527 F.2d 1308, 1311 (5th Cir. 1976). Relevant factors in this determination include "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation . . . ." *Zippo* at 36, quoting *United States v. Silk,* 331 U.S. 704, 716 (1947). Finally, "the determination of the [employer-employee] relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity." *Zippo* at 36, quoting *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730 (1947).

Similarly, in Elliott-Larsen actions Michigan courts look to "the totality of the circumstances surrounding the performed work in relation to the statutory scheme under

consideration." *McCarthy v. State Farm Insurance Co.*, 170 Mich. App. 451, 455 (1988), citing *Wells v. Firestone Tire & Rubber Co.*, citing *Wells v. Firestone Tire & Rubber Co.*, 421 Mich. 641, 648 (1984). "While control of the worker's duties is to be considered under the economic reality test, other equally important factors include payment of wages, authority to hire and fire, and the responsibility [of the alleged employer] for the maintenance of discipline." *Id.*

Turning to the present case, the Court finds the following relevant undisputed facts regarding the plaintiff and defendant's relationship: (1) the plaintiff received commissions, not a salary, as compensation; (2) the plaintiff controlled scheduling of his working hours; (3) the plaintiff incurred his own expenses in visiting customers, and deducted these expenses from his income for tax purposes; (4) the defendant refused to provide the plaintiff health insurance; (5) the plaintiff did not participate in any existing pension, retirement, or profit-sharing plans offered by the defendant; (6) the defendant exercised some control over sales quotation approval; (7) plaintiff's business card identified him as a "sales engineer" for the defendant. Given these facts, and the elements of both the state and the federal economic realities tests, we conclude that the plaintiff was not an employee for purposes of either the ADEA or Elliott-Larsen. The defendant exercised little control over the actual performance of the plaintiff's duties. Rather, the deposition testimony suggests a hands-off relationship in that respect. Furthermore, the plaintiff's reliance on the defendant's approval of price quotations is not persuasive evidence of an employer-employee relationship. In this situation, the defendant acted more as a customer of the plaintiff; that is, the plaintiff independently discovered potential purchasers for the defendant's products, and thereafter approached the defendant with a proposed purchase agreement. While the Court recognizes that this arrangement is not as purely independent as that

between manufacturers and wholesalers, nonetheless the thrust of the relationship involves the independence of the plaintiff in conducting his sales operation. *Donahue v. Pendleton Woolen Mills, Inc.*, 47 E.P.D. ¶38, 364 (S.D.N.Y. 1988), relied on in the plaintiff's brief, is not only of limited precedential value, but is also factually distinguishable from the current case. There, the defendant paid Social Security taxes on behalf of the plaintiffs, regularly advanced moneys as part of the plaintiffs' compensation package, offered the plaintiffs the opportunity to participate in a health insurance program, held sales meetings and paid for the same, and required authorization prior to the plaintiffs opening any new account. In sum, the plaintiff in the present case has not presented sufficient proof to counter the defendant's evidence of independence. The totality of the circumstances demonstrates an individual dependent upon himself, not the defendant, for the operation of his enterprise. The Court therefore finds that since the plaintiff was not the defendant's employee, both age discrimination claims, under the ADEA and Elliott-Larsen, must be dismissed.[1]

IV.

Our dismissal of the plaintiff's ADEA claims effectively eliminates the federal question from plaintiff's complaint. Thus, under the discretion granted federal district courts in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), we dismiss the remaining state law claims without prejudice.

Based upon the foregoing, the Court GRANTS the defendant's motion for summary judgment with respect to the plaintiff's age discrimination and retaliation claims un-

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[1] Although not specifically addressed in either party's brief, the requirement of employee status for coverage under the ADEA applies to retaliation, as well as discrimination,, claims. *See Asklar v. Honeywell, Inc.*, 95 F.R.D. 419, 424-25 (D. Conn. 1982). Thus, the plaintiff's entire claim under the ADEA is dismissed.

der both state and federal law, and DISMISSES WITHOUT PREJUDICE plaintiff's remaining claims.

IT IS SO ORDERED.

/s/ James Harvey
JAMES HARVEY
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 87-CV-30088-PH

ROBERT LILLEY,

Plaintiff,

-vs-

BTM CORPORATION,

Defendant.

FILED-CLERK
UNITED STATES DISTRICT COURT

MAY 17 1989

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ORDER

At a session of said court held in the Federal Building, Port Huron, Michigan on the 17th day of May 1989

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

Consistent with the Court's oral opinion of May 16, 1989, the Court's Memorandum Opinion and Order of March 23, 1989, granting the defendant's motion for summary judgment, is REVERSED and the judgment is VA-

CATED. Additionally, the Court DENIES the defendant's motion for summary judgment concerning the plaintiff's age discrimination claims under state and federal law, in light of existing issues of material fact. All other aspects of the defendant's motion are taken under advisement.

IT IS SO ORDERED.

/s/ James Harvey
JAMES HARVEY
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HON. AVERN COHN

Case No. 87-CV-30088

ROBERT LILLEY,

Plaintiff,

v.

BTM CORPORATION,

Defendant.

VERDICT

I. Liability

Age Discrimination

1. Was Robert Lilley an employee of BTM Corporation?

__X__ YES

(check only one)

_____ NO

(If the answer is "yes" go to Question 2. If the answer is "no," your deliberations are over).

2. Did BTM Corporation discriminate against Robert Lilley on the basis of his age?

__X__ YES

(check only one)

_____ NO

3. Did BTM retaliate against Robert Lilley for filing charges of age discrimination?

__X__ YES

(check only one)

_____ NO

4. Did BTM willfully discriminate against Robert Lilley on the basis of his age.

__X__ YES

(check only one)

_____ NO

Damages For Age Discrimination And/Or Retaliation

(Complete this section if you answered "yes" to Question 2 or 3)

5. Robert Lilley has been damaged by the loss of back pay in the amount of:

$250,000.00,

and by the loss of front pay in the amount of:

$300,000.00,

and Robert Lilley has been damaged in the form of compensatory damages for mental and emotional distress in the amount of:

$250,000.00.

Dated: 11-16-89

/s/ John A. Printz
FOREPERSON

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 87-30088

ROBERT LILLEY,

Plaintiff,

v.

BTM CORPORATION, a Michigan Corporation,

Defendant.

[Table of Contents Omitted in Printing]

OPINION

I. Introduction

This is an age discrimination in employment case tried to a jury, under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), and Michigan's Elliott-Larsen Civil Rights Act, M.C.L. § 37.210 *et seq.* (Elliott-Larsen). Because the proscriptions of the two statutes are substantially the same, and because federal jurisdiction is predicated on the ADEA the Court has looked mostly to federal precedents in reaching its decision.

Plaintiff, Robert Lilley (Lilley), was a commissioned salesperson from late 1982 to mid 1987 for defendant, BTM Corporation (BTM). Lilley's complaint made four claims; age discrimination (he was 64 when his services were terminated); retaliatory discharge (he was prematurely terminated when he told BTM he had filed an age discrimination charge with the Michigan Department of

Civil Rights); wrongful discharge in breach of an oral and/or implied contract of employment (*Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579 (1980)); and failure to pay commissions in breach of an oral and/or implied agreement (Lilley alleged he was entitled to commissions on all sales to the customers he procured; BTM answered that he was entitled to commissions on the sales he procured).

The wrongful discharge claim was dismissed at the conclusion of Lilley's proofs when it became clear Lilley had been paid on all of the sales, including reorders, that he procured. To the extent Lilley claimed a right to commissions on sales to any customer of BTM he initially procured, *ad infinitum*, regardless of whether or not he had anything to do with the sale, this claim was also dismissed at the conclusion of his proofs.

The case was tried over nine days in November 1989. On November 19, 1989, the jury returned a verdict in favor of Lilley finding that he was an employee of BTM and not an independent contractor; that BTM discriminated against him on the basis of his age; that BTM retaliated against him for filing a charge of age discrimination; and that age discrimination was willful. The jury awarded Lilley damages for loss of back pay of $250,000; damages for the loss of front pay of $300,000; and damages in the form of compensation for mental and emotional distress of $300,000.

Now before the Court for decision are a variety of post-trial motions, all timely filed. BTM moves for a judgment notwithstanding the verdict or in the alternative for a new trial, Fed. R. Civ. P. 50(b) and 59, on the grounds that Lilley was an independent contractor, that age discrimination was not a determining factor in his termination, that there was no evidence of willfulness and that the damage awards were excessive. This last ground was not raised in Lilley's initial motion papers but raised in re-

sponse to a letter from the Court. Lilley had an opportunity to respond. See Fed. R. Civ. P. 59(d). Lilley moves for an award of liquidated damages, i.e., doubling of the pay awards, pursuant to 29 U.S.C. § 626(b); pre-judgment interest, M.C.L. § 600.6013; and for attorney fees, 29 U.S.C. § 626(b), 29 U.S.C. § 216(b), and M.C.L. § 37.2802.

For the reasons that follow, the Court will deny BTM's motion as to the status of Lilley, finding there is no reason to disturb the jury's determination that he was an employee. However, the Court will grant a new trial on the claim of age discrimination. As will be explained, right and justice require a new trial. It is doubtful that there was sufficient evidence to support the jury's finding on age discrimination. The jury's finding as to willfulness is supported by the evidence only as to the premature termination of Lilley's services. The damages awarded fall outside the maximum range that the jury could reasonably find. More importantly, the relevant evidence at trial as to the age discrimination claim was tainted by allowing the jury to hear Lilley's proofs on the claim for commissions, and the Court's instruction at the conclusion of Lilley's proofs that such a claim was no longer in the case was insufficient to remove the taint. Lastly, it should have been made clear to the jury that the claim for willfulness was restricted to the premature termination of Lilley's services and not to the termination itself. Lilley's post-trial motions are mooted by the Court's decision and will not be discussed further.[1]

II. Pretrial Proceedings

The case was filed October 2, 1987. Pretrial proceedings, largely managed by a magistrate, were extended and con-

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[1] It should be noted that the instructions, even though the parties agreed on them, were too simplistic and did not sufficiently apprise the jury of the law that was to be applied to the facts as they found them.

tentious. A BTM motion to dismiss Count IV, the commissions claim, on the grounds it was preempted by Michigan's Wages and Fringe Benefits Act, M.C.L. § 408.471 *et seq.* was denied on February 9, 1989.[2] On March 23, 1989, BTM's motion for summary judgment on the independent contractor defense was granted, and the case was dismissed under the authority of *United Mineworkers v. Gibbs*, 383 U.S. 715 (1966). On May 16, 1989, on Lilley's motion for reconsideration the dismissal was reversed without explanation.

The joint pretrial statement was approved July 17, 1989. In the statement, Lilley characterized his termination as a forced retirement, a term traditionally used where an employee is the beneficiary of some sort of benefit plan (which admittedly was not present here), and claimed an entitlement to commissions "on all subsequent sales to customers he procured for BTM but where were credited to other sales employees," and "on all future sales to customers he procured for the TOG-L-LOC and LANCE-N-LOC systems *ad infinitum*."

On October 24, 1989, Lilley's *Toussaint* claim was dismissed.

On November 7, 1989, Lilley filed a detailed statement of his pay and commissions damages discounted to present value under three different theories. On a loss of earnings theory, he stated that his damages were $1,644,080, assuming he continued to be employed until age 70 and that he died at age 80. On his procuring cause claim, he stated that his damages were $1,534,514, and on an unjust enrichment basis, he stated that his damages were $3,225,060.

Prior to trial, the Court decided several motions in limine. BTM moved to preclude Lilley from testifying that

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[2] This assertion seems inconsistent with BTM's vigorously argued position that Lilley was an independent contractor.

the accountant who prepared his tax returns, which listed him as self-employed, was also the accountant for BTM. BTM hoped to keep an edge on the assertion that the tax return was an admission by Lilley. The motion was denied. The Court ruled Lilley could not testify as to statements by BTM's customers that they intended to continue to buy BTM's product on the grounds that such statements were hearsay. The Court also ruled that Lilley could not testify as to any refund he received from the Internal Revenue Service, on the grounds that IRS treatment of Lilley's status as either self-employed or an employee had no probative value. The Court, on Lilley's motion, ruled that his 1983 divorce decree was irrelevant. Lastly, the Court ruled that BTM could not argue that one of Lilley's lawyers admitted in a pretrial hearing that Lilley was only entitled to commissions on the sales he procured.

These pretrial rulings are indicative of the intensity and overbreadth of the manner in which counsel approached this case.

III. Trial

A. Witnesses

1.

At trial, Lilley testified as to the initiation of his employment with BTM; the course it followed; his decision to terminate his employment on October 19, 1987, so he could realize his lifelong dream of sailing around the world; his reconsideration and change of plans because of a downturn in commissions caused by a downturn in economic conditions; his disputes with Ed Sawdon (Sawdon), president of BTM, over his entitlement to commissions; Sawdon's refusal to allow him to reconsider; his filing a discrimination claim; and the confrontation with Sawdon that led to his dismissal on July 13, 1987. Lilley also testified as to the emotion impact of his termination and the break-up of his marriage.

Christine Lilley, Lilley's wife, testified as to her relationship with Lilley, their plans to sail around the world, the change in plans, the confrontation with Sawdon, and the impact of the termination on Lilley. James Conroy, Guy Hubert, and John Navorce, each a representative of a BTM customer, testified as to Lilley's sales efforts and the manner in which he represented BTM.

Michael H. Thomson (Thomson), an economist, opined on Lilley's loss of commissions between July 13, 1987 and the date of trial and future loss of commissions. Essentially, Thomson took Lilley's historical earnings, determined an appropriate incremental increase for each year subsequent to termination, and then projected forward to age 70 on an annual basis, discounting the resultant figures to present value. Thomson's assessment, which was purely mathematical, was simplistic and failed to account for the vagaries of economic conditions generally, Lilley's limited product line (he sold only BTM's patented TOG-L-LOC and LANCE-N-LOC metal joining systems), and the vicissitudes small tool manufacturing companies such as BTM experience.

Lilley also called Sawdon as a witness. He hired Lilley in the first instance and had the principal relationship with Lilley during the course of his employment. Sawdon confirmed, in part, Lilley's version of the relationship and, on cross-examination, explained the reason for refusing to allow Lilley to reconsider his decision to leave on October 19, 1987. Sawdon particularly explained his decision to bring in-house the sales effort for the TOG-L-LOC and LANCE-N-LOC line of tools. The jury could have found that the explanation was not particularly credible.

Testifying in BTM's case, aside from Sawdon on cross-examination, were Douglas Archer, BTM's controller, who witnessed several of the conversations between Lilley and Sawdon; Andrew Janiszewski (Janiszewski) and Steven Sawdon, employees of BTM who followed up on Lilley's

sales effort and who explained some of Lilley's shortcomings, i.e., lack of engineering experience; and Milus Allison, vice-president of BTM. Janiszewski, in particular, testified as to Lilley's enthusiasm, ability to sell, and the contribution he made to BTM.

B. Exhibits

Exhibits at trial included correspondence, commission statements, quote books, tooling for TOG-L-LOC and LANCE-N-LOC, tax returns, brochures, Lilley's sales diaries, calendars, checks, Lilley's notes, business cards, quotations, correspondence, commission summaries and a variety of miscellaneous papers, as well as the discrimination charges filed with the Michigan Department of Civil Rights.

C. Findings

1. Liability

The evidence at trial relating to liability, viewed in a light most favorable to Lilley, went generally as follows:

1. In November 1982, Lilley was out of work. He had sales experience in the automobile industry. He observed a new plant being built by BTM. He solicited a sales position with BTM. After several conversations with Sawdon, he went to work selling BTM's patented metal fastening systems, TOG-L-LOC and LANCE-N-LOC. Lilley and Sawdon agreed Lilley would be paid on a straight commission basis of 5% of sales. Lilley was to receive no advances and no medical or other benefits given to regular BTM employees. To Sawdon, Lilley's ability to produce sales for BTM was uncertain.

2. TOG-L-LOC and LANCE-N-LOC utilized special tools and dies manufactured by BTM. Each sale required a certain amount of engineering work with which Lilley had no familiarity. He depended on BTM employees to do such

work. BTM also sold the systems directly through employees Steven Sawdon and Andrew Janiszewski, men much younger than Lilley, and through independent distributors. The distributors, also paid 5% of sales, arranged for the necessary engineering work through outside shops.

3. For the first several months, Lilley received no money from BTM and depended on his unemployment compensation checks.

4. Lilley testified at trial in response to a question from the Court as follows:

> Q. And what specifically did he [meaning Sawdon] say you would receive the 5% commission sales on?
>
> A. When we discussed the commission, it was based on customers that I could procure—what business I could bring in from those customers.

In a pretrial deposition conducted on April 26, 1989, Lilley testified along the same lines at p. 343 as follows:

> I would assume that after I left BTM, there would be people calling on the customers that I called on, and they would, in their right, develop business, not because of my activity but because of their activity, not on the same project that I was involved with but perhaps a different project. At that point, I would not expect to be renumerated.

5. Lilley treated his income from BTM on his income tax return as income from self-employment. Lilley deducted the BTM-related expenses that he paid without reimbursement. Lilley controlled his own hours of work and vacation time and generally called on prospective customers that he sought out. Lilley received no employee benefits from BTM. Lilley prepared his own quotations for prospective customers.

6. BTM did the engineering work on prospective Lilley sales. it did not do this for distributors. BTM was required to approve the quotation Lilley prepared. Lilley attended sales meetings regularly, had his office at BTM, could be reached by telephone at BTM, and BTM provided secretarial services to him. Sawdon prepared business cards for Lilley listing him as a BTM sales engineer. Some of Lilley's expenses were reimbursed by BTM; other expenses where charged directly to BTM. As far as his customers knew, Lilley worked for BTM. When a customer called Lilley at BTM and he was not there, the call was directed to Steven Sawdon or Janiszewski.

7. While Lilley was free to generate his own customers nationwide, he was precluded from calling on certain customers. On occasions when Lilley ran into a problem on a sale, he was taken off the account and Steven Sawdon or Janiszewski completed the sale.

8. BTM was Lilley's sole source of income. BTM did not take withholding for Lilley and reported his income on an IRS Form 1099.

9. Lilley did not have a separate order book for prospective sales. He entered prospective sales and proposals in the BTM order book in the same fashion as Steven Sawdon and Janiszewski.

10. After the first couple of years at BTM, Lilley's income began to rise because of the success of his sales efforts. In 1986, Lilley was paid $86,000, almost half of which came from a single sale. Steven Sawdon and Janiszewski earned substantially less.

11. In 1986, Lilley was working on several sales that, if closed would earn him substantial commissions. In 1986, Lilley and Sawdon began having differences over which sales entitled Lilley to a commission. Lilley on occasion told Sawdon that he thought a prospective sale or a potential customer was being diverted to Steven Sawdon or

Janiszewski. Tensions developed between Lilley and Sawdon. They were exacerbated by Lilley's difficulty with the engineering required to close a sale and the need to call in Steven Sawdon or Janiszewski on occasion.

12. Sometime in 1986, Lilley bought a sailboat and began to make plans to sale around the world with his wife. He told Sawdon of his plans and his intention to leave BTM on October 19, 1987. By this time Lilley and his wife anticipated that Lilley would have earned commissions paid, and to be paid, in an amount sufficient to support the two of them for several years as they sailed around the world. Sawdon agreed to Lilley's leaving.

13. In late 1987 and early 1988, Lilley suffered a downturn in commission income because of a general slowdown in economic conditions and because certain potential sales were not resulting in purchase orders as quickly as he anticipated.

14. On May 1, 1987, Lilley wrote Sawdon as follows:

> Circumstances involving project curtailments by the major auto companies have caused Christine and I to revise our planned trip in October, 1987.
>
> Because of temporary postponement of items like the B.O.C. instrument panel reinforcement at Center Stamping, the hood assembly at the Budd Company, the lateness of the Hedwin gas tank sheild assembly, etc., we will not be able to complete the purchase of our boat as planned this fall. These suppliers (as well as others) have indicated to me that they will use the BTM Tog-L-Loc process when the authorizations come through. General Electric also has extensive plans for using the BTM Tog-L-Loc process for items that I have introduced to them.
>
> The only way that I can see for me to realize compensation for the time and effort that I have

> already invested in these projects that are recorded in the BTM Quote Book is to continue working per our agreement of five per cent (5%) commission on purchase orders that BTM receives as a result of my efforts.
>
> When at some future date, forecasts for sales in the auto industry are more promising, then I can again begin countdown plan for my retirement.

15. In the Spring of 1987, Sawdon and Allison decided to change the manner in which BTM marketed TOG-L-LOC and LANCE-N-LOC. According to Sawdon, because engineering was so important to closing a sale, they decided to cut out distributors and sell only directly. Sawdon also said because of the bickering with Lilley and Lilley's lack of engineering skills, they decided, with Lilley's leaving, that he would not be replaced. To announce these changes Sawdon, sometime before May 1, 1987, began preparation of a bulletin.

16. On May 1, 1987, Sawdon issued the bulletin announcing the change. It is likely Lilley knew of the change in sales methods before it was announced. It is also likely that Sawdon knew of Lilley's change of plans before he received Lilley's letter.

17. The bulletin reads in part:

> UPDATING OF BTM DISTRIBUTOR D POLICY FOR 1987
>
> *TOG-L-LOC, LANCE-N-LOC and SPECIAL MACHINES*
>
> The TOG-L-LOC and LANCE-N-LOC sheet metal joining systems and other SPECIAL MACHINES will not be sold thru distributors or five percenters. Nor will any finders fees be paid.
>
> These systems are special products and require a high amount of factory communication directly

> with the customer before, during and after the sale. After much experience with this product, we feel that the customer is best serviced in this manner. The effective date for this change is Oct. 20th, 1987. All prospective applications that the distributor or 5 percenter has worked on will be honored for 120 days after this date. A letter to Ed Sawdon describing the application in detail along with the BTM Quote No. to your customer will insure that you receive credit.

Lilley was the only "5 percenter" working for BTM.

18. Following May 1, 1987, Sawdon told Lilley that he would have to leave October 19, 1987, and that his change of plans to sail around the world made no difference. When Sawdon refused to let Lilley continue on at BTM, Lilley filed a charge of age discrimination with the Michigan Department of Civil Rights on July 8, 1987. He asked the Department not to mail the charge. Rather, Lilley and his wife personally advised Sawdon of the charge on Friday, July 10, 1987. Sawdon was incensed. A verbal brawl ensued which involved Lilley's wife. Sawdon terminated Lilley on July 13, 1987. Lilley was 64 years old at the time.

19. The Charge of Discrimination, filed July 8, 1987, reads, in part, as follows:

> "On May 4, 1987 I received notification from the President of the Company that I will be forced to retire effectively on October 19, 1987. I have expressed to the President that this is not my desire nor intent (sic) to retire at that time. I believe that respondent is terminating our working agreement because of my age."

Prior to filing the charge, Lilley consulted a lawyer.

20. On July 14, 1987, Lilley filed a second Charge of Discrimination, alleging retaliation.

21. Following his termination, Lilley's customer prospects were turned over to Steven Sawdon and Janiszewski. About a year later, BTM hired Steven Boehm, age 28, as a full time employee. There was no evidence that Boehm's hiring was contemplated at the time Sawdon declined to reconsider Lilley's situation. Boehm did not replace Lilley. He had significantly different training and responsibilities.

22. At the time of termination, Lilley had been performing in a generally satisfactory manner and was responsible for approximately 25% of BTM's volume of TOG-L-LOC and LANCE-N-LOC sales. His customers were satisfied, and he had trained Janiszewski in sales work.

23. The termination had an adverse emotional effect on Lilley. He became depressed. He could not sleep. His marriage collapsed. His income dropped substantially. He could no longer make the payments on his sailboat. He has been unable to find employment.

24. Following October 31, 1987, BTM continued to sell TOG-L-LOC and LANCE-N-LOC through distribution except that the necessary engineering work was done by BTM.

25. On occasion, in casual conversations, Sawdon would say that he preferred younger people to work for him.

2. Damages

26. The only testimony on damages came from Thomson. He expressed the opinion that, had Lilley continued to work for BTM to November 19, 1989 (the day trial began), he would have earned $315,007, and had he continued to work from November 19, 1989 to age 70, he would have earned $535,075.[3] Thomson arrived at these figures by computing the percentage increases in Lilley's earnings while working at BTM for the years 1983-86 and concluded

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[3] Each amount was discounted to present day values.

that Lilley's earnings would have increased 31% over his 1986 earnings of $83,884 in each of the years 1987-89. Thomson also concluded that Lilley's earnings would increase 10% in each of the years 1990-93 over the base year of 1989. Thomson deducted the approximately $60,000 Lilley actually earned in the years 1987-89.

27. Thomson did not take into account Lilley's pessimistic forecast for 1987 (which caused him to change his plans about sailing around the world), a possible slowdown in the automobile industry, that the market might become saturated with TOG-L-LOC and LANCE-N-LOC systems, the possible rise of competitive metal joining systems, or Lilley's ambition to stop working and sail around the world at some future date.

3. Other

The findings do not include any reference to the testimony at trial regarding matters that were irrelevant to the issue of age discrimination. Lilley repeatedly attempted to display to the jury the size of BTM's physical plant and did bring out Sawdon's compensation and bonuses. There was testimony about Sawdon and Lilley arguing over Sawdon's reluctance to pay full commission on very large sales and efforts at BTM to misappropriate customers in Lilley's view. Lastly, there was testimony, disputed by Sawdon, concerning an alleged exclusive arrangement for Lilley to sell a power clamp product manufactured by BTM.

4. Directed Verdict

By his own admission, Lilley was paid all of the commissions on all of the sales he actually procured. The claim for commissions where Lilley may have originated the customer but did not procure the particular sale was not presented to the jury. The Court was wrong in its interim instruction, when it allowed into evidence Lilley's tax returns, in stating:

> There are, in a sense, two different lawsuits going on. Two different sets of claims by the plaintiff. One is a claim for breach of contract in which he says my agreement with the defendant was that I was to get five percent commission on the sales by the defendant to customers which I procured for the company. That meant, one I procured the customer and then the customer was now a customer of BTM, in the future whether I actually made the sale or not, I continue to get five percent because I, in effect, have introduced that customer to BTM, and I, therefore, was the procurer of the customer.
>
> It's the company's position, that wasn't our deal. You were to get five percent on the sales that you made. So in other words until there was a purchase order, we delivered on the purchase order and we got paid. You didn't get anything, and you got paid five percent in effect on the receipts per purchase order. That is one of the lawsuits.

The Court's ruling came prior to its dismissal of Lilley's contractual claim for commission damages. That dismissal occurred following Lilley's case-in-chief. The reasons for the dismissal are reflected above. Essentially Lilley, or more likely his counsel, failed to distinguish between Lilley's duties under his agreement with Sawdon and the manner of computing his compensation. Under Lilley's view of his agreement, BTM would be paying in effect a double commission on future sales to customers he initially contacted even though such sales were no more than simply reorders. This makes no sense. *See Short v. Centri-Spray Corp.*, 369 Mich. 303 (1963); *Reed v. Kardziel*, 352 Mich. 287 (1958).

5. Other Trial Rulings

Two rulings at trial were of some importance.

The Court, after considerable argument, allowed Lilley to examine BTM witnesses to elicit Sawdon's comments about preferring younger persons. Whether the jury placed any weight on such comments is, of course, unknown. It is unlikely, in view of the fact that Lilley was almost 60 at the time that he began working for BTM.

The Court precluded Thomson from testifying as to the damages to Lilley because of BTM's refusal to recognize his right to commissions on sales from customers he procured. This part of Thomson's proposed testimony was objected to by BTM after he took the witness stand on the grounds it was speculative and conjectural. Oversimplified, Thomson based his opinion on aggregate invoices of a discrete customer list prepared by Sawdon. Thomson multiplied the aggregate invoices by 5% and then deducted 7.55% from the total as associated expenses. Thomson assumed the resultant figure, $123,953, would be earned each year by Lilley through age 80, since these customers would likely do business with BTM in the same amount through 2003. Thomson discounted the aggregate figure to present value and then made some minor adjustments in it. Thomson acknowledged that these calculations were purely mathematical.

IV. Discussion

A. Independent Contractor v. Employee

The first issue to be addressed is BTM's argument that Lilley's status is to be decided by the Court and not a jury. BTM is wrong. Where a plaintiff's status under ADEA is at issue, and there are disputed questions of fact, resolution is by the jury and not the judge. *Martin v. United Way of Erie County,* 829 F.2d 445 (3rd Cir. 1987); *Mallare v. St. Luke's Hosp.,* 699 F. Supp. 1127 (E.D.

Pa. 1988). The rule is the same under Michigan law. *Nichol v. Billot*, 406 Mich. 284 (1979); *McCarthy v. State Farm Ins. Co.*, 170 Mich. App. 451 (1988).

As to the jury's determination of Lilley's status, there was certainly enough evidence at trial to allow the jury to conclude that he was an employee, and neither the test for JNOV, *Ratliff v. Wallington Exempted Village School Bd. of Educ.*, 820 F.2d 792, 795 (6th Cir. 1987)(whether there is sufficient evidence to raise a question of fact), nor the traditional test for new trial, *Toth v. Yoder Co.*, 749 F.2d 1190, 1197 (6th Cir. 1979)(the motion addresses itself to the Court's discretion; the Court may weigh the evidence and set the verdict aside if it is against the clear weight of the evidence) has been met here. BTM acknowledges that in virtually every case like this one there are facts going both ways. The jury was instructed to examine the economic realities underlying the relationship and look to see if Lilley was susceptible to the discriminatory practices that ADEA was designed to eliminate. Doubts, the jury was told, were to be resolved in favor of coverage. *See Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983); *EEOC v. First Catholic Slovak Ladies Ass'n*, 649 F.2d 1068 (6th Cir. 1982).

Based on the evidence at trial, the jury could find that BTM had an element of control over what Lilley did, paid him for his efforts, and that the performance of his duties, i.e., sales, was an integral part of BTM's business of selling more TOG-L-LOC and LANCE-N-LOC systems. Certainly, the manner in which Lilley booked orders, his dependence on Steven Sawdon and Janiszewski for engineering, the fact he could be removed from a sales effort, as well as the manner in which BTM wanted its customers to view him, could lead to the conclusion that he was more an employee than an independent contractor and therefore was entitled to the protection of ADEA.

B. Age Discrimination

The evidence on the age discrimination claim is of a far different order. In ordering a new trial, the Court is doing more than reweighing the evidence and drawing inferences different from those the jury may have drawn. The Court does more than feel that other results are more reasonable. The Court has a firm conviction that a mistake has been made. As stated in C. Wright, *The Law of Federal Courts*, 635 (4th ed. 1983):

> It may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions of this type. Necessarily all such formulations are couched in broad and general terms that furnish no unerring litmus for a particular case. On the one hand, the trial judge does not sit to approve miscarriages of justice. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all that the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Underlying this principle is Justice Gray's statement in *Capital Traction v. Hof*, 174 U.S. 1, 13-14 (1899)

> "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions . . . is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on

> law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.

Lilley was 58 years old when he went to work for BTM. Comparing him to Steven Sawdon and Janiszewski, full time experienced employees, was invidious. The difference in his terms of employment, as argued by Lilley, was of no moment. He had no engineering experience and had difficulty on occasion in closing sales of TOG-L-LOC and LANCE-N-LOC. The fact that, on termination, his sales efforts were taken up by Steven Sawdon and Janiszewski again was of no moment and that was neither direct evidence of age discrimination nor could any inference be drawn from it. Someone, of necessity, had to follow up on the customers on which Lilley formerly called. *See Wilhelm v. Eaton Corp.*, 790 F.2d 515, 521 (6th Cir. 1986). The circumstances presented to the jury were unlike those in *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1180-81 (6th Cir. 1983), because Lilley was not *replaced* by Steven Sawdon or Janiszewski.

Lilley himself initiated his termination by announcing that he would leave to sail around the world. There was no evidence that BTM prompted this announcement. The downturn in his sales prospects and economic conditions caused him to change his mind. That Sawdon declined to accept the change, having rethought his position about Lilley's work for BTM, is not direct evidence of age discrimination and does not allow an inference of age discrimination. Tension had developed between Lilley and Sawdon over entitlements regarding commissions. They disagreed over which sales Lilley was procuring. Overlaying this dispute was Lilley's ambiguous claim to sales generated from customers where he procured the initial sale. The evidence regarding this dispute was as much direct to Lilley's procuring cause claim, which the Court dismissed, as to his age discrimination claim.

What buttressed Lilley's claim of age discrimination, but not sufficiently to carry the day for him the Court's view, were Lilley's comments about preferring younger people and the manner of the bulletin. Lilley was the only "five percenter" at BTM. To wrap him in with a change of policy as to distributors just made no sense. However, the likely fact that Sawdon did not want to tell him point blank that he had to leave creates an ambiguity as to Sawdon's motive and can be further explored at a new trial without the irrelevant evidentiary overlap that existed at this trial.

C. Willfulness

The circumstances of Lilley's premature termination also cause the Court to rule for a new trial. While the termination date, July 13, 1987, may show willfulness, that date was simply an acceleration of a subsequent date as to which there was no evidence directly or by inference of retaliation or willfulness. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 128-30 (1985)(termination must be with full knowledge of a violation of ADEA or in reckless disregard of its provisions); *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988)(age must be the predominant fact to find willfulness).

D. Damages

The excessiveness of the damages awarded is a further ground for ordering a new trial. The test of excessiveness is not simply that the award be "within the universe of possible awards and . . . supported by the evidence." *Molton v. City of Cleveland*, 839 F.2d 240, 250 (6th Cir. 1988), *cert. denied*, 103 L.Ed.2d 814 (1989), but that "the quantum of damages [be] *clearly* within 'the maximum limit of a reasonable range' ". *Manning v Altec, Inc.*, 488 F.2d 127, 133 (6th Cir. 1973)(quoting *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 149 (D.C. Cir. 1969)). While

remittitur might be appropriate in some cases, it is not appropriate here given the manner in which Thomson opined on back pay and front pay. Nothing in the record remotely supports the 30% increments for back pay or 10% increments for front pay. Paragraph 27 of the findings, *supra*, as well as the description of Thomson's methodology amply support the Court's view that the damages evidence, which the jury discounted somewhat, requires a new trial.

In this connection, it should be noted that front pay is a substitute for reinstatement, and the Court in its discretion must make an independent determination as to the appropriateness of front pay. *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 922-23 (6th Cir. 1984). Even if the Court were to determine that front pay was appropriate, Thomson certainly extended it beyond reason in light of Lilley's announced intention to quit working as soon as he put enough away to support a two-year sailing trip around the world.

For the same reason, the $250,000 for emotional damages is also excessive, given the relatively brief period Lilley worked at BTM, his announced plan to leave, and his subsequent change-of-heart. However devastating the loss of his working for BTM was, Lilley certainly had to know when he changed his mind that Sawdon might not agree and should have been prepared to accept the consequences. The proofs regarding the emotional distress daages lack the specificity required by the Sixth Circuit. *See Rodgers v. Fisher Body Div.*, 739 F.2d 1102, 1108 (6th Cir. 1984); *Reetz v. Motor Hotel Management, Inc.*, 875 F.2d 867, 1089 U.S. App. LEXIS 7057.

E. Lilley's Position

In reaching the decision to grant a new trial on the age discrimination issue, the Court has carefully considered *Plaintiff's Supplemental Memorandum On Record Evidence*

With Respect To Age Discrimination filed at the Court's request following oral argument. The Court asked Lilley to marshal the evidence from which the jury could infer discrimination. Lilley did so, and his efforts came close to causing the Court to believe initially that it might be doing that which is forbidden by the rules governing new trial; that is, reweighing the evidence by drawing different inferences or conclusions than were drawn by the jury. The Court is satisfied that it has not done so. The assertion that "before and after Lilley's termination" his job responsibilities were transferred to younger men is not supported by the evidence; any transfers "before" termination were caused either by Lilley's lack of engineering experience or part of the dispute over commissions. Neither of these causes had anything to do with age. Second, the events of July 10-13, 1987 had nothing to do with Lilley's claim of age discrimination. By July 10, 1987, the decision to terminate Lilley had been made. That was the reason why Lilley filed charges with the Michigan Department of Civil Rights.

Likewise, the four cases cited by Lilley in his Supplemental Memorandum do not persuade the Court that his proofs allow the verdict to stand in light of the considerations previously discussed. While the cases relate unexceptional rules of law, with which the Court fully agrees, each has a substantially different scenario. In *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152 (6th Cir. 1988), the company vice-president for sales kept a profile on the retirement base of the company and a chart of the age of its sales employees. In *McMahon v. Libbey-Owens-Ford Co.*, 870 F.2d 1073 (6th Cir. 1989), a group of terminated employees showed that statistical evidence and age was a consideration in the termination and selection of personnel. The case involved no real economic issues. In *Bruno v. W.B. Saunders Co.*, 882 F.2d 760 (3d Cir. 1989), the court held that the reason given for hiring a younger person who replaced the plaintiff could have been found to be

pretextual. Finally, in *Christie v. Foremost Insurance Co.*, 785 F.2d 584 (7th Cir. 1986), the fired employee was replaced by a younger, less experienced person.

Age may well have been a factor in Sawdon's actions. Lilley on retrial will have the opportunity, and the right, to offer proofs to such effect. This offering, however, will have to be unadulterated by irrelevancies.

V. Conclusion

The requirement of a new trial creates judicial waste as well as waste of a considerable expenditure of time and money by Lilley and BTM. If the Court does its duty as it understands it, this waste cannot be avoided. Had Lilley's age discrimination evidence not been distorted at trial by emphasis on Sawdon's perceived mistreatment on commissions as well BTM's unreasoned effort to deny Lilley the benefits of the Act, the jury would have been able to focus on the true issue in the case: whether Lilley's age was a factor in Sawdon's decision not to allow him to reconsider his decision to quit his job so that he could spend two years sailing around the world living on his savings and on commissions yet to be paid on sales made before he quit.

The deputy clerk will set a status conference to schedule the retrial and preparation of a new Joint Pretrial Statement.

Avern Cohn

AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: APR 11 1990

Detroit, Michigan

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 87CV30088PH

ROBERT LILLEY,

Plaintiff,

v.

BTM CORPORATION, a Michigan Corporation,

Defendant.

FILED
1987 DEC 29 PM 3:12
JAMES HARVEY

COMPLAINT AND JURY DEMAND

NOW COMES Plaintiff, Robert Lilley, by and through his attorneys, BUTZEL LONG GUST KLEIN & VAN ZILE, and in making this Complaint against the above-named Defendant, states as follows:

1. Plaintiff is a resident of the City of Port Huron, County of St. Clair, State of Michigan.

2. Plaintiff's date of birth is October 5, 1923.

3. Defendant, BTM Corporation is a Michigan corporation with its principal place of business located in the City of Marysville, County of St. Clair, State of Michigan.

4. Plaintiff was employed as a Sales Engineer by Defendant from November, 1982 until July 13, 1987 when he was involuntarily discharged.

5. Plaintiff's duties as a Sales Engineer included, without limitation, introducing potential customers to the patented TOG-L-LOC and LANCE-N-LOC metal joining systems, procuring customers an increasing sales of Defendant's presses, fixtures and other tools an equipment used in the metal joining systems.

6. During Plaintiff's employment with Defendant, Defendant provided Plaintiff with an office, secretarial services and unlimited telephone service.

7. Plaintiff's compensation as a Sales Engineer for Defendant was based upon commissions from sample work requested by prospective customers and the sale of Defendant's presses, fixtures, equipment and other tools purchased by customers solicited and/or procured by Plaintiff.

8. Plaintiff solicited and/or procured many new customers for Defendant, including but not limited to, Chrysler Corporation, Ford Motor Company, General Electric Company, Haworth Inc. and Sanyo Machine Works Ltd.

9. Plaintiff was responsible for significantly increasing sales of Defendant's presses, fixtures, tools and other equipment used in the TOG-L-LOC and LANCE-N-LOC metal joining systems.

10. Despite Plaintiff's success in procuring new clients for Defendant and increasing Defendant's sales, Plaintiff was notified by Defendant in May, 1987 that he would be forced to retire in October, 1987 at the age of 64.

11. On July 8, 1987, Plaintiff filed a Charge of Discrimination with the Michigan Department of Civil Rights and the Equal Employment Opportunity Commission asserting that the notification by Defendant of his forced retirement by October, 1987 constituted unlawful age discrimination. A copy of this Charge of Discrimination is attached as Exhibit A.

12. On July 10, 1987, Plaintiff informed the President of Defendant that he had filed the aforementioned Charge of Discrimination. The President of Defendant thereupon informed Plaintiff that he was fired. A few moments later, the President of Defendant notified Plaintiff that he had to think over his decision of whether to fire Plaintiff.

13. On July 13, 1987, when Plaintiff arrived at his office at Defendant's premises, the President of Defendant met with Plaintiff and against notified him that he was fired.

14. On July 14, 1987 Plaintiff filed another Charge of Discrimination with the Michigan Department of Civil Rights and the Equal Employment Opportunity Commission asserting that he was discharged on July 13, 1987 due to his age and in retaliation for filing a previous Charge of Discrimination on July 8, 1987. A copy of this Charge of Discrimination is attached as Exhibit B.

15. Subsequent to Plaintiff's discharge on July 13, 1987, Defendant has withheld from Plaintiff's commissions due and owing as a result of sample work done for prospective customers and sales of fixtures, tools and other equipment to customers that Plaintiff procured and/or solicited on behalf of Defendant.

16. This Court has jurisdiction in this matter based upon 28 U.S.C. §1331 and the Court's pendant and ancillary jurisdiction.

COUNT I

(AGE DISCRIMINATION)

17. Plaintiff hereby incorporates by reference all of the foregoing allegations, ¶¶1-16, as though fully set forth herein.

18. At all times relevant to this action, Defendant was an employer within the meaning of the Age Discrimination in Employment Act, 29 U.S.C. §621, *et. seq.* ("ADEA")

and the Elliott-Larsen Civil Rights Act, M.C.L.A. §37.2101 *et. seq.* ("Elliott-Larsen").

19. At all times relevant to this action, Plaintiff was an employee of Defendant within the meaning of ADEA and Elliott-Larsen.

20. At all times relevant to this action, Plaintiff was in the class of persons protected under ADEA and Elliott-Larsen.

21. At all times relevant to this action, Plaintiff was qualified and capable of performing all of the duties and responsibilities of the Sales position he held with Defendant.

22. Under ADEA and Elliott-Larsen, Defendant had a duty to Plaintiff not to discharge or otherwise discriminate against him with respect to his employment, compensation or any term, condition or privilege of employment because of his age.

23. Notwithstanding the aforementioned duties and in knowing and willful violation of said duties, Defendant discriminated against Plaintiff by:

a. Subjecting Plaintiff to conditions of employment which younger employees in comparable positions were not subjected;

b. Withholding from Plaintiff conditions of employment that were offered and/or provided to younger employees in comparable positions;

c. Ordering Plaintiff to retire from the employment of Defendant no later than October, 1987, contrary to Plaintiff's desire;

d. Discharging Plaintiff from employment due to his age;

e. Assigning Plaintiff's job duties and customers that he procured to younger sales employees.

24. As a direct and proximate result of Defendant's unlawful and willful conduct as described above, Plaintiff suffered the loss of employment, loss of earnings and other benefits of employment, loss of earning capacity, loss of interest on the amount ascertainable as Plaintiff's loss of earnings, such interest accruing from the date of such loss, embarrassment and humiliation, and mental and emotional distress, all of these damages continue at the present and into the future.

WHEREFORE, Plaintiff demands judgment against Defendant in whatever amount is deemed appropriate at trial, but in excess of Ten Thousand Dollars ($10,000.00), for damages and losses in past, present and future compensation and interest, liquidated damages for Defendant's willful violations and whatever additional or alternative relief this Court deems appropriate, together with all costs and attorneys fees incurred by Plaintiff in prosecuting this action.

COUNT II

(RETALIATORY DISCHARGE)

25. Plaintiff hereby incorporates by reference all of the foregoing allegations, ¶¶1-24, as though fully set forth herein.

26. Under ADEA and Elliott-Larsen, Defendant had an obligation not to discriminate or retaliate against Plaintiff because he opposed discriminatory conduct by Defendant or because Plaintiff filed Charge of Discrimination.

27. Notwithstanding the aforementioned obligations and in knowing and willful violation of said obligations, Defendant discharged Plaintiff on or about July 13, 1987 in retaliation for Plaintiff filing a Charge of Discrimination against Defendant on July 8, 1987 (Exhibit A).

28. As a direct and proximate result of Defendant's retaliatory and willful conduct as described above, Plaintiff

suffered the loss of employment, loss of earnings and other benefits of employment, loss of earning capacity, loss of interest on the amount ascertainable as Plaintiff's loss of earnings, such interest accruing from the date of such loss, embarrassment and humiliation, and mental and emotional distress, all of these damages continue at present and into the future.

WHEREFORE, Plaintiff demands judgment against Defendant in whatever amount is deemed appropriate at trial, but in excess of Ten Thousand Dollars ($10,000.00), for damages and losses in past, present and future compensation and interest, liquidated damages for Defendant's willful violations and whatever additional or alternative relief this Court deems appropriate, together with all costs and attorneys fees incurred by Plaintiff in prosecuting this action.

COUNT III

(WRONGFUL DISCHARGE IN BREACH OF ORAL AND/OR IMPLIED EMPLOYMENT CONTRACT)

29. Plaintiff incorporates by reference all of the foregoing allegations, ¶¶1-28, as though fully set forth herein.

30. During oral discussions between Plaintiff and the President of Defendant that led to Plaintiff's hire by Defendant and in other subsequent conversations with officials of Defendant, Plaintiff was given oral assurances to the effect that his employment and the terms and conditions of his employment would not be adversely affected without just cause.

31. The employment practices and policies of Defendant also reasonably led Plaintiff to expect that he would not be discharged and his employment would not otherwise be adversely affected without just cause.

32. Plaintiff reasonably relied upon the above-described verbal assurances and practices and policies of Defendant

in accepting and continuing his employment with Defendant.

33. At all times during his employment with Defendant, Plaintiff performed his duties in an exemplary manner.

34. The above-described verbal assurances and practices and policies of Defendant created an oral and/or implied employment contract which prohibited Defendant from discharging or otherwise adversely affecting Plaintiff's employment with Defendant without just cause.

35. Notwithstanding the existence of the above-described oral and/or implied employment contract, Defendant discharged Plaintiff on July 13, 1987 arbitrarily, in bad faith and without just cause.

36. As a direct and proximate result of the breach of the oral and/or implied employment contract, Plaintiff suffered the loss of employment, loss of earnings and other benefits of employment, loss of earning capacity, and loss of interest on the amount ascertainable as Plaintiff's loss of earnings, such interest accruing from the date of such loss, all of these damages continue at present and into the future.

WHEREFORE, Plaintiff demands judgment against Defendant in whatever amount is deemed appropriate at trial, but in excess of Ten Thousand Dollars ($10,000.00), for damages and losses in past, present and future compensation, benefits and interest and whatever additional or alternative relief this Court deems appropriate, together with all costs and attorneys fees incurred by Plaintiff in prosecuting this action.

COUNT IV

(FAILURE TO PAY COMMISSIONS IN BREACH OF ORAL AND/OR IMPLIED EMPLOYMENT CONTRACT)

37. Plaintiff hereby incorporates by reference all of the foregoing allegations, ¶¶1-36, as though fully set forth herein.

38. During oral negotiations between Plaintiff and the President of Defendant that led to Plaintiff's hire by Defendant, Plaintiff was informed that his work duties would include, without limitation, introducing the TOG-L-LOC and LANCE-N-LOC metal joining systems to new and existing customers of Defendant and procuring customers and sales of Defendant's products used in the metal joining systems.

39. During the oral negotiations that led to Plaintiff's hire by Defendant, Defendant promised and agreed to pay Plaintiff a 5% commission on purchase orders for Defendant's presses, fixtures and other tools and equipment received from businesses procured and/or solicited by Plaintiff. Defendant subsequently agreed to pay Plaintiff, in addition, a 10% commission on sample work done for prospective customers procured and/or solicited by Plaintiff.

40. Throughout his employment with Defendant, Plaintiff regularly received 5% commissions on purchase orders Defendant received from business procured and/or solicited by Plaintiff and 10% commissions on sample work done for prospective customers procured and/or solicited by Plaintiff.

41. As a direct and proximate result of Plaintiff's efforts in introducing the TOG-L-LOC and LANCE-N-LOC metal joining systems to businesses and procuring customers and sales of Defendant's equipment used in the metal joining systems, the number of Defendant's customers and the amount of its annual sales significantly increased during the term of Plaintiff's employment with Defendant.

42. The above-described oral assurances by officials of Defendant and the practice of Defendant of paying Plaintiff 5% or 10% commissions created an oral and/or implied contractual obligation on the part of Defendant to pay Plaintiff a 5% commission on purchase orders received from Defendant from customers procured and/or solicited

by Plaintiff and a 10% commission on sample work requested by prospective customers procured and/or solicited by Plaintiff.

43. In 1984, the President of Defendant orally agreed to give Plaintiff exclusive rights for one year to sell Defendant's power clamps at a 5% commission on all sales of the power clamps.

44. Less than six months after agreeing to give Plaintiff exclusive rights to sell Defendant's power clamps, Defendant breached its oral agreement and permitted outside distributors to sell its power clamps.

45. Within the one year period in which Defendant gave Plaintiff exclusive rights on the sale of its power clamps, Defendant and/or its outside distributors sold power clamps to customers without paying commissions or other compensation on all such sales to Plaintiff.

46. Prior and subsequent to Plaintiff's termination from the employment of Defendant, Defendant has received and completed purchase orders and sample work received from customers procured and/or solicited by Plaintiff without paying to him any commission or other compensation.

47. Subsequent to his termination from the employment of Defendant, Plaintiff has not received any commission or other compensation on purchase orders or sample work received and/or completed by Defendant from customers procured and/or solicited by Plaintiff.

48. Under the procuring theory, Plaintiff is entitled to recover from Defendant not only commissions presently due and owing to him from purchase orders and sample work received from customers procured and/or solicited by him, Plaintiff is also entitled to receive commissions on future purchase orders and sample work completed by Defendant for customers originally procured and/or solicited by him.

49. Plaintiff is further entitled under the doctrines of quantum meruit and unjust enrichment to commissions on past and future sales by Defendant to customers which were procured by Plaintiff but for which he has not received any commission or other compensation.

50. As a direct and proximate result of Defendant's breach of its oral and/or implied contractual obligations to Plaintiff, Plaintiff has suffered the loss of earnings and other benefits of employment, loss of interest on the amount ascertainable as Plaintiff's earnings, such interest accruing from the date of such loss, and loss of earning capacity, all of these damages continue at present and into the future.

WHEREFORE, Plaintiff demands judgment against Defendant in whatever amount is deemed appropriate at trial, but in excess of Ten Thousand Dollars ($10,000.00), for damages and losses in past, present and future compensation and interest and whatever additional or alternative relief that this Court deems appropriate, together with all costs and attorneys fees incurred by Plaintiff in prosecuting this action.

BUTZEL LONG GUST KLEIN & VAN ZILE

By Robert M. Vercruysse
Robert M. Vercruysse (P21810)

By John D. Gullen
John D. Gullen (P35915)

1881 First National Building
Detroit, Michigan 48226
(313) 963-8142
Attorneys for Robert Lilley

Dated: December 29, 1987

DEMAND FOR JURY TRIAL

NOW COMES Plaintiff, Robert Lilley, by and through his attorneys Butzel Long Gust Klein & Van Zile and hereby makes demand for trial by jury on all issues and claims raised in the above Complaint.

BUTZEL LONG GUST KLEIN & VAN ZILE

By Robert M. Vercruysse
Robert M. Vercruysse (P21810)

By John D. Gullen
John D. Gullen (P35915)

1881 First National Building
Detroit, Michigan 48226
(313) 963-8142
Attorneys for Robert Lilley

Dated: December 29, 1987

APPENDIX J

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 87-CV-30088-PH

ROBERT LILLEY,

Plaintiff,

v.

BTM CORPORATION, a Michigan Corporation,

Defendant.

Proceedings had and testimony taken in the above-entitled matter before HONORABLE AVERN L. COHN, District Judge, United States District Court, Detroit, Michigan on Wednesday, November 15, 1989.

APPEARANCES:

BUTZEL LONG GUST KLEIN & VAN ZILE, P.C.

1650 First National Building

Detroit, Michigan 48226

(By: Robert M. Vercruysse and Ronald E. Reynolds, Esq.)

Appearing on behalf of Plaintiff

Robert Lilley

THE FISHMAN GROUP

Suite 350

2050 North Woodward Avenue

Bloomfield Hills, Michigan 48013

(By: William E. Pilchak, Esq.)

Appearing on behalf of Defendant

BTM Corporation

* * * *

[44] Go to lunch.

Don't talk about the case, it's not over yet, because you don't know the rules of law, you haven't heard the rules of law you are to apply.

You go to lunch and we'll reassemble at 2:00 o'clock sharp. It will take about a half hour to instruct you on the rules of law.

Okay.

(Jury excused.)

THE COURT: Sit down.

MR. VERCRUYSSE: I apologize to the Court.

THE COURT: No, no.

I think that I made a mistake in the instructions. I think that the age discrimination and employment instruction drafted by Plaintiff, Pages 11 and 12 of their instructions, should be given as it was originally submitted.

MR. VERCRUYSSE: Thank you, your Honor.

THE COURT: First of all, my change would shift the burden of proof, and I have just looked at *Armbruster* v *Quinn* and *Briden* v *Road Systems. Inc.* I personally believe it's a question of law. I don't even believe it's a question for the jury.

[45] But, be that as it may, since you agreed to have it submitted to the jury and at this late date it would be

wrong to take it from the jury, I think I would commit serious error were I to give it in the form that I've edited. Because every statement that I deleted is part of the case law. I'll give you a chance to argue with me again on this Mr. Pilchak, and if you want the cases, if you don't have them, *Briden* and *Armbruster* are up here, you can borrow them, but you just have to be sure you return them.

So look at them and then we'll see where we are at.

Thank you.

I'll see you just before 2:00 o'clock.

(Recess)

THE COURT: Are we ready for the jury?

MR. PILCHAK: I would like to speak to the changes on Pages 11 and 12, your Honor.

THE COURT: Go ahead.

MR. PILCHAK: Your Honor, I have reviewed the three cases that are listed on the instruction.

It is my observation, your Honor, that all three of those cases are summary judgment cases. [46] *Armbruster* was decided in the context of the of a jurisdiction of twelve, I believe it was a demotion, but the Court indicates that since such questions are determined in the same manner as the summary judgment issue, it goes on to apply the summary judgment standards.

And *Fauls* and *Briden* are straightforward. My problem is this, your Honor, I think that in the context of a summary judgment, the language that has been crossed out and that the Court now proposes to add back in is appropriate because what you're deciding is a question of law and summary judgment, it's probably appropriate to give the benefit of the doubt to the Plaintiff. But when it's an issue of fact, it goes to the jury.

I am going to add a little footnote, that I've always said it was a question of law. I argued that in front of Judge Harvey, and it is still my position here today.

If it is being submitted to the jury, the effect of additing the language that the Court has crossed out, which the Court will now add back in, shifts the burden of proof to the Defendant. And it is my impression that the Plaintiff does, as part of his case, have the burden of proving that he was [47] an employee.

THE COURT: I'm not so sure that he does. I'm inclined to believe that a higher order analysis of the law in this area would suggest that presumptively he's an employee, that he should be taken out of the protective scope of the act, the burden is on someone such as you, to demonstrate that he was not an employee. And that for him to obtain coverage, he doesn't have the burden, and I'm content to rest on that. If I'm wrong, I'm wrong.

I think that it's probably a mixed question of law and fact, whatever that means. And ultimately the determination is to be made by the Court.

Perhaps certain factual differences are to be resolved by the jury, and the way we should have proceeded was with a series of interrogatories to the jury, and the judge, based upon those answers, makes the ultimate determination.

But I do not believe the ultimate determination of whether or not one is covered by the act is left to the conscience of the community, which is a fancy way of saying the jury.

* * * *

APPENDIX K

* * * *

[51] THE COURT: You file those with the Clerk.

MR. PILCHAK: Thank you.

THE COURT: And that will be the way it is memorialized in the record as to those three. There's no need to read it in to the reporter's notes at this time.

(Jury in court.)

You may be seated.

Ladies and gentlemen, there is no need for you to take notes on the instructions, because you will have a cassette recording of them in the jury room. I urge you, though, to listen.

Before I begin giving you the rules, I am going to read the verdict form to you. These are the questions you're going to have to answer. And I'll read it again when I complete it, but I think it will help you understand them.

I.

Liability.

Age Discrimination.

1. Was Robert Lilley an employee of BTM Corporation?

Yes ___

[52] No _____

If you answer no, that concludes your deliberations.

If you answer yes, then you continue with the rest of the question.

2. Did BTM Corporation discriminate against Robert Lilley on the basis of age?

Yes ___

No _____

3. Did BTM Retaliate against Robert Lilley for filing charges of age discrimination?

Yes ___

No _____

4. Did BTM willfully discriminate against Robert Lilley on the basis of his age?

Yes ___

No _____

Then there's a second part, damages for age discrimination and/or retaliation. You complete this section if you have answered yes to Question 2 or 3 above.

5. Robert Lilley has been damaged by the loss of back pay in the amount of _____ dollars, and by the loss of front pay in the amount of _____ dollars. Robert Lilley has been [53] damaged in the form of compensatory damages for mental and emotional distress in the amount of _____ dollars.

Now, you have heard the evidence and the arguments of the lawyers. It is now my duty as the Judge to instruct you as to the law applicable to this case.

On occasion I may have given you an instruction during the course of trial. Any instruction which I gave you during the course of trial should be considered by you along with these instructions when you deliberate.

I'm going to divide these instructions into three parts. First, I'll talk about rules that apply to a juror's duties in considering a case generally, then I'll talk about the law applicable to this particular case, then I'll give you instructions regarding the verdict and how you go about deliberating. Listen carefully. If you have any questions,

or you're not sure you understand what I'm saying to you completely, towards the close I'll tell you how you can talk to me.

It is your duties as jurors to follow the law as stated in these instructions and to apply the rules of law I give you to the facts as you find [54] them from the evidence that you're heard and seen during the course of trial.

You are not to single out one instruction alone as stating the law, but must consider these instructions as a whole.

You are not to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon anything but the evidence you've seen and heard in this courtroom.

Now, nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of this case, or I have any opinion about how this case should be decided. It is not my function to determine the facts, but it is yours as the jury.

Justice through trial by jury always depends on the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors. To arrive at a verdict by applying the same rules of law as given in [55] these instructions.

Now, as I've told you, you've been chosen and sworn as jurors to try the issues of fact presented by this case. You are to perform this duty without bias or prejudice to either party. Our system of law does not permit jurors to be governed by sympathy, prejudice of public opinion. The parties expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by me, and reach a just verdict.

BTM Corporation is entitled to the same fair and unprejudice treatment as an individual would be under like

circumstances. And it is your duty to decide the case with the same impartiality you would use in deciding a case between two individuals.

Now, the evidence in the case consists of the sworn testimony of the witnesses regardless of who may have called them, and all of the exhibits received in evidence regardless of who may have produced them. And, any fact which may have been admitted or stipulated by the parties.

Any evidence to which an objection was sustained by me, and any evidence I observed stricken must be disregard by you in arriving at your [56] decision. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. Arguments, statements and remarks of the lawyers are not evidence, and you should disregard anything said by a lawyer which is not supported by the evidence or by your own general knowledge and experience.

If any reference by me or any lawyer to a matter of evidence does not coincide with your own recollection, it is your recollection which controls when you deliberate.

On occasion you were excused, or the try delayed while questions of law and matters solely for me to consider were discussed with the lawyers. This is a usual and regular procedure. Don't discuss or consider what you think transpired in the courtroom when you were not here.

On occasion you may have heard an objection from one of the lawyers. It is not only the right, but the duty of the lawyer during the trial to make objections. A lawyer would be derelict in his duty if he did not raise objections whenever, in his judgment, the evidence offered was contrary to law, rules or procedures, as the lawyer, in his best judgment interprets them.

[57] Don't allow yourself to be swayed in your honest judgment because of any objection of a lawyer for either side during the trial.

On occasion during the course of the trial it appeared necessary in my view to caution a lawyer who out of zeal for his cause may have said or done something that I thought was inappropriate. Don't draw any inference against the side to whom the caution may have been directed. Any expression or statement by me was for the sole purpose of assuring that the trial was being fairly conducted, and that you had the opportunity to fairly hear and consider the testimony and exhibits.

As sole judges of the facts you have to decide which of the witnesses you believe, what portion of their testimony you accept, and what weight to attach to it.

At times during the trial I may have sustained an objection to a question without allowing a witness to answer, or when an answer was given I may have instructed that it be stricken and you disregard it. Don't draw any inference from an unanswered question. Don't consider testimony which has been stricken in reaching your decision.

The law says that your decision is to [58] be made solely upon the basis of the competent evidence before you. Any items I excluded from your consideration were excluded, because in my view they were not legally admissible.

The law does not, however, require you to accept all the evidence I admitted, even though it be competent. In determining what evidence you will accept, you must make your own evaluation of the testimony given by each of the witnesses and determine the degree of weight you choose to give his or her testimony.

The testimony of a witness may fail to conform to the facts as they occurred, because the witness is intentionally telling a falsehood. Because the witness did not see or hear that about which the witness testified, or because recollection of the event is faulty, or because the witness did not express himself or herself clearly when giving testimony.

There is no magic formula by which one may evaluate testimony. You, as jurors, bring with you to this courtroom all of the experience and background of your lives. In your every day affairs you determine for yourselves the reliability or unreliability of statements made to you by others. [59] The sames tests that you use in your every day dealings are the tests that you apply when you deliberate.

The interest or lack of interest of any witness in the outcome of the came, the bias or prejudice of the witness if there be any. Age, appearance, the manner in which the witness gives testimony on the stand. The opportunity the witness had to observe the facts concerning which the witness testified. The probability or improbability of the witness' testimony when viewed in light of all the other evidence in the case are all items to be taken into your consideration in determining the weight, if any, you assign to a particular witness' testimony.

If such considerations make it appear that there is a discrepancy in the evidence, you'll have to consider whether the apparent discrepancy may not be reconciled by fitting the two stories together. However, if that's not possible, you're going to have to determine which of the conflicting versions you accept.

A witness may be discredited or impeached by contradictory evidence, or by evidence that at some other time the witness has said or done something, or failed to say or do something which is [60] inconsistent with the witness' present testimony. If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

Now, with regard to a party who is a witness, what he or she said or did earlier may be considered not only in deciding whether you should believe the testimony of the party, but also may be considered as evidence of the facts in this case.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have the right to distrust such witness' testimony in other particular, and you may reject all the testimony of the witness, or give it such credibility as you may think it deserves. When I say, "knowingly," I mean voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Now the rules of evidence ordinarily do not permit a witness to testify as to opinions or conclusions. An exception to the rule exists as to those whom we call expert witnesses. That is, witnesses who by education and experience have become expert in some art, science, profession or calling, [61] may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert's opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, you should conclude that the reasons given in support of the opinion are not sound, if you feel that it's outweighed by other evidence in the case, you may disregard the opinion entirely.

Now, generally speaking, there are two types of evidence from which a jury may properly find the truth as to the facts of the case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect, or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with a preponderance of all the evidence in the case, both direct and circumstantial.

In weighing all the evidence as to a [62] fact, it is proper to consider the number of witnesses testifying on one side or the other as to that fact, but the number of witnesses alone should not persuade you if the testimony of the lesser number of witnesses is more convincing to you.

During the trial, some of the evidence was presented to you by the reading of a deposition. A deposition, as I told you, is a record of the sworn testimony of a witness taken before an authorized person. The parties and the lawyers have the right to be present and to examine and cross-examine the witness. This evidence is entitled to the same consideration as you would give the same testimony had the witness testified in open court.

I'm now going to discuss with you the law applicable to this particular case.

First, I'm going to define the term "preponderance of the evidence." Listen carefully, because I'm not going to repeat the definition.

Then, I'm going to talk to you about what must be prove with regard to liability and damages.

After that I will describe to you the claims of the parties in their own words.

Then, I will conclude the instructions [63] with the rules of law you must follow in deliberating on these matters.

Now, when I use the term "preponderance of the evidence," I mean evidence which proves that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as when considered and compared with that opposed to it, has more convincing force and produces in your mind a belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, you may

consider the testimony of all the witnesses regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

Now, in this case, the Plaintiff, Robert Lilley, claims that the Defendant, BTM, discriminated against him because of his age. Under federal law, it is unlawful for an employer to discriminate in terms of hire, to force an employee to retire, or terminate an employee or otherwise discriminate against any employee because of that employee's age when the employee's age is 40 years of [64] age or older.

Under Michigan law it is unlawful for an employer to discriminate against an employee because of age.

More specifically, Robert Lilley says that he was an employee of BTM Corporation, which BTM Corporation denies. The term "employment" in social welfare legislation, such as the Federal Age Discrimination Act and Michigan's Age Discrimination Act, which is sometimes called the Elliott Larsen Civil Rights Act, is given a broad interpretation so as to effectuate the liberal purposes of these laws.

It is for you to decide whether Robert Lilley was an employee of BTM.

Now the manner in which the parties viewed their relationship is not determinative of the issue. Rather, you must examine the economic realities underlying the relationship between Robert Lilley and BTM in an effort to determine whether Robert Lilley is likely to have been susceptible to the discriminatory practices which these laws are designed to eliminate.

You should consider the degree of Robert Lilley's economic dependence on BTM. The determination of employee status rests upon the [65] totality of the circumstances underlying the relationship between Robert Lilley and BTM.

The facts to be considered in determining the economic realities test as it is sometimes called are,

One, who controlled the worker's duties. Who paid the wages? Who had the right to hire, fire and maintain discipline, and the worker's performance of duties as an integral part of the employer's business towards the accomplishment of a common goal.

If there is a doubt or ambiguity in the matter, you should resolve it in favor of coverage. Establishment of an independent contractor relationship requires a convincing accumulation of factors indicating that Robert Lilley's services were rendered in pursuit of his separate business enterprise of selling those services.

If you find, based upon the preponderance of the evidence, that Robert Lilley was an employee of BTM, then he is within the protection of the federal law and the state law. If you find that Robert Lilley was not an employee of BTM, then he is not within the protection of these laws.

Now, under these laws it is unlawful [66] for an employer to discriminate an employee because of the employee's age. In order for you to find for Robert Lilley, he must prove by a preponderance of the evidence that his age was a determining factor in BTM's decision to discharge and/or involuntarily retire him. He need not prove that age was the sole or exclusive motivation for BTM's discrimination. Age is a determining fact if Robert Lilley would not have been discharged and/or involuntarily retired except for his age.

Robert Lilley is not required to produce direct evidence of unlawful motive. Discrimination, if it exists, is seldom admitted. But it is a fact which you may infer from the existence of other facts.

In deciding whether Robert Lilley's age was a determing factor in BTM's decision to discharge and/or involuntarily

retire him, you should first consider whether Robert Lilley has established the following facts.

First, that he was within the protected age group, that is, he was 40 years of age or older. This fact is not in dispute.

* * * *

APPENDIX L

[Trial proceedings held - July 24, 1990]

[4] * * * for you to come in from Port Huron.

MR. HEYBOER: No, no, we'll be here.

THE COURT: Number two, I am leaving Friday morning and will not be back for a week. So if they don't finish their verdict by tomorrow at 5:00 o'clock, then I'll have to get a substitute judge to preside over their deliberations. And I can be reached by telephone part of the time. I'll be in a plane part of the time Friday, but I can be reached by phone, and talk to the judge. I'm not sure which judge it will be, but it will be another judge or a magistrate.

Okay.

MR. HEYBOER: Does the Court want to go over objections—

THE COURT: You can go over objections on the record now.

MR. VERCRUYSSE: Your Honor, I am going to take leave right now. Mr. Reynolds will put the objections on the record.

THE COURT: All right.

MR. VERCRUYSSE: Thank you, your Honor.

THE COURT: Go ahead, Mr. Reynolds.

MR. REYNOLDS: Your Honor, we have previously filed out proposed jury instructions with [5] the Deputy Clerk, and I would just note for the record that we object to the failure to follow the instructions which are contained on Page 12, 14, 15, 16 and 19.

We would further object to the giving of the following instructions, which are contained on Page 12, 14, 15 and 16 for the reason that we feel that our 12, 14, 15 and 16 are more accurate statements of the law.

With regard to the instruction given on Page 19, we have an objection for the reason that it's cumulative, argumentative, and with respect to the employee at will issue, is simplistic and prejudicial, and is not in conformance with Michigan law.

And then, our final objections are to the giving of the instructions contained on Pages 22 and 22(a).

Thank you, your Honor.

For the reason that they fail to proper interrelate retaliation and age discrimination.

Thank you, your Honor.

THE COURT: Mr. Heyboer.

MR. HEYBOER: I would object to the Court's giving of the instruction on Page 13 as it [6] relates to the essential elements of the Plaintiff's claim, wherein the Court did not include the fourth criteria of replacement by a younger person.

I would further object to the instruction on Page 16 where the Court dealt with the fact the employee can unilaterally change his resignation date. We believe this is contract law, which does not allow a unilateral change in conditions. And in conjunction with that instruction on Page 16, we have requested our Instruction No. 21, which deals with resignation and the fact that an announced withdrawal cannot be unilaterally changed.

Also, your Honor, as to Page 17 on willfulness, we believe that our Instruction 26(a) is more appropriate as to the law, and we further believe, your Honor, that there must be a separate finding of willfulness on the retaliation issue. I understand the Court's interpretation of the law that if there is finding of willfulness on age discrimination, there is automatically a finding of willfulness on retaliation.

I firmly believe that the instruction as our No. 26(a) proposed should have more clearly set forth that the willfulness is as to age discrimination only, and not as to the retaliation. [7] I recognize the way the jury verdict form appears to differentiate that.

We further, your Honor, object to the Court not giving our Instruction No. 18, which dealt with the good faith belief of the company as relates to age discrimination and willfulness, considering the employee/independent contractor issue.

Also, the Court's failure to give our 29(a), which is the failure to instruct that this is not a case on lost commissions. More importantly, based upon the jury argument, the closing argument by Plaintiff counsel that we believe was nothing more than an appeal to passion, that it is clearly at that point appropriate that they be given an instruction that this loss of commission case, or a breach of contract case.

We further object, your Honor, to the instruction, the failure to instruct as to damages on November 29 regarding the fact that an employee, an individual cannot be put in a better position through damages on front and/or back pay than he would have been had he continued on.

And, your Honor, as to Page 23 of the instructions, the Court did delete the language concerning back pay wherein the Court defined back [8] pay as "back pay, that is the amount—that is the loss of compensation between the date of discharge and today." The language that the Court deleted was, "unless you find Mr. Lilley would have voluntarily left BTM before today." I believe that, and your Honor, I'm not trying to indicate at all that the Court was trying to give the jury any indication, but a juror could misinterpret that.

THE COURT: The jury has gone home.

MR. HEYBOER: Fine, your Honor.

Also, as to the jury instructions itself, excuse me, the jury verdict form, that the jury should be required to make a finding of willfulness on the retaliation issue.

Other than that, your Honor, I have no objections.

THE COURT: I assume that you filed with the Clerk your proposed set of instructions?

MR. HEYBOER: Yes, I did, Judge.

THE COURT: I'm not going to respond to explain why the instructions—any particular instruction was rejected at this time.

I reserve my right to do so at a later time should it become appropriate to the circumstances.

APPENDIX M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 87-30088

ROBERT LILLEY,

Plaintiff,

v.

BTM CORPORATION,

Defendant.

MEMORANDUM ON MOTION FOR PREJUDGMENT INTEREST AND/OR LIQUIDATED DAMAGES*

Plaintiff has moved for prejudgment interest and liquidated damages on the jury's verdict in this retaliatory discharge case. The background and facts relating to the jury's verdict are recited in the Memorandum On Motion For New Trial, Or In The Alternative, For Remittitur and need not be repeated. Importantly, the case was tried under both federal and state law. This requires the Court to make its decision on plaintiff's motion consistent with the variations in such laws regarding liquidated damages and prejudgment interest.

The $350,000.00 emotional distress damages award is clearly based on plaintiff's state law claim since such damages are not available under federal law. *Hill v. Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983). State law specifically allows for prejudgment interest. Therefore, plaintiff is entitled to prejudgment interest on the $350,000.00 from the

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*This is a revision of the Court's bench decision of December 20, 1990.

date of the filing of the complaint, December 27, 1987, to the date of judgment, October 5, 1990. Mich. Comp. Law § 600.6013.

Plaintiff is entitled to liquidated damages on the $75,000.00 compensatory damages award. Implicit in the jury's finding of retaliation is a finding of willfulness. See *Rose v. Hearst Magazine Division,* 814 F.2d 491, 493 (7th Cir. 1987); *Powell v. Rockwell International Corporation,* 788 F.2d 279, 286 (5th Cir. 1986). There is no Court of Appeals for the Sixth Circuit decision inconsistent with this determination. A finding of willfulness under the Age Discrimination In Employment Law, 29 U.S.C. § 621 *et seq.,* allows for liquidated damages in the form of an award equal to the compensatory award. 29 U.S.C. § 7626(b); 29 U.S.C. § 216(b).

The jury in the second trial which found retaliation was instructed as follows:

> Robert Lilley has a separate claim for retaliation on the actions taken July 10-13, 1987.
>
> In order to prove his claim of retaliation, Robert Lilley must prove by preponderance of the evidence that: (1) he initiated an action seeking relief for conduct that was allegedly discriminatory on the basis of age; (2) BTM found out that he had filed charges of age discrimination before it took any adverse action; (3) BTM retaliated against him because he brought those charges; and (4) the fact that he filed those charges was a significant reason for any adverse conduct by BTM.

The $75,000.00 compensatory damages award was under federal law. *See Wojtkowski v. Cade,* 725 F.2d 127 (1st Cir. 1984). When liquidated damages are awarded prejudgment interest may not be awarded. *Rose v. National Cash Register,* 703 F.2d 225 (6th Cir. 1983). There is au-

thority for the proposition that an award of liquidated damages must be deducted from any contemporaneous award for emotional distress damages. See *Merkel v. Scovill, Inc.*, 570 F. Supp. 141 (S.D. Ohio 1983) and *Garry v. TRW, Inc.*, 603 F. Supp. 157 (N.D. Ohio 1985). Alternatively, in *Powers v. Grinnell Corporation*, 915 F.2d 34 (1st Cir. 1990), the Court of Appeals for the First Circuit approved the district court's requiring a successful plaintiff to elect between: (1) taking liquidated damages on an ADEA claim or (2) foregoing liquidated damages and accept prejudgment interest as if the compensatory damages were awarded under state law. The Court is satisfied the proper way to deal with the question in this case is to follow the rule in *Wojtkowski, supra.*

Plaintiff may present an amended judgment including prejudgment interest on the emotional distress damages award as described above, and liquidated damages on the compensatory damages award as described above, *nunc pro tunc*, October 5, 1980.

/s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: FEB 28 1991
Detroit, Michigan